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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-923

CONSTRUCTION INDUSTRY ASSOCIATION OF SONOMA COUNTY, a California non-profit corporation, THE SAN FRANCISCO, PENINSULA AND REDWOOD EMPIRE BUILDING INDUSTRY ASSOCIATION, a California non-profit corporation, PETALUMA PARTNERS, a California limited partnership, and WILLIAM LAWRENCE,
Petitioners,

vs.

THE CITY OF PETALUMA, a California Charter City, HELEN PUTNAM, ROBERT A. BRUNNER, JOHN W. CAVANAGH, ROBERT E. DALY, JAMES L. HARBERSON, FRED V. MATTEI, and WILLIAM A. PERRY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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The petitioners Construction Industry Association of Sonoma County, a California non-profit corporation, The San Francisco, Peninsula and Redwood Empire Building Industry Association, a California non-profit corporation, Petaluma Partners, a California limited

partnership, and William Lawrence, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on August 13, 1975.

OPINION BELOW

Construction Industry Assn. of Sonoma County v. City of Petaluma, 375 F.Supp. 574 (N.D.Calif. 1974), *rev'd.,* 522 F.2d 897 (9th Cir.) *rehearing and hearing en banc den.,* ..... F.2d ..... (9th Cir. October 2, 1975)[1]

JURISDICTION

The opinion of the court of appeal was rendered and judgment entered on August 13, 1975. A timely petition for rehearing *en banc* was denied on October 2, 1975 and judgment filed in the court of appeals on October 14, 1975. This petition for certiorari is filed within ninety days of October 2, 1975. This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

[1]The district court opinion has been noted in a number of legal, planning, and urban affairs journals. See, Note, 2 Ohio North. L. Rev. 318 (1974); Note, 31 Wash. & Lee L.Rev. 575 (1974); Note, 3 Fordham Urban L.J. 137 (1974); Note, 51 N.D. L.Rev. 509 (1974); Note, 6 Seton Hall L.Rev. 207 (1974); Note, 19 Villanova L. Rev. 739 (1974); Note, 5 Cumber-Sam. L.Rev. 543 (1975); Note, 9 Georgia L.Rev. 260 (1974); Note, 23 Kansas L.Rev. 324 (1975); Note, 35 Louisiana L.Rev. 676 (1975); Note, 50 L.A. Bar Bull. 252 (1975); Note, 36 Ohio St. L.J. 128 (1975); Note, 28 Vanderbilt L.Rev. 430 (1975). See, also 26 Land Use Law & Zoning Digest No. 7 at 611 (1974); Comment, 84 Yale L.J. 1564 (1975); Comment, 12 Harv. J. Legis. 244 (1955); Comment, 5 Pacific L.J. 570 (1974); Comment, 26 Hast. L.J. 849 (1975).

QUESTIONS PRESENTED

1. Whether plaintiffs who have demonstrated their own standing must show the existence of a "special, on-going relationship", outside the context of the legislation being challenged, with third persons whose rights they seek standing to assert with their own.

2. Whether a municipal ordinance with the express purpose and effect of excluding substantial numbers of new residents from the city shall be judged on a rational basis standard or by some higher and stricter test.

3. Whether a city legislating for "the general welfare" by intentionally excluding new residents must measure and consider the impact of its law on prospective residents, on other cities forced by the exclusionary law to absorb disproportionately large shares of regional housing demand, and on the quality of the region's housing stock.

CONSTITUTIONAL PROVISIONS INVOLVED

The following provisions of the Constitution of the United States:

1. Article I, Section 8;
2. Article III, Sections 1 and 2; and
3. Amendments 9, 10, and 14, Section 1.[2]

[2]This litigation involves in part the right to travel, whose source in the Constitution of the United States is not settled. See, *e.g.,* Comment, *Shapiro v. Thompson: Travel, Welfare and the Constitution,* 44 N.Y.U. L.Rev. 989 (1969).

All of these provisions are printed in Appendix F to this petition.

STATEMENT OF THE CASE

Petaluma began the 1960s as a relatively self-sufficient town of 21,400 people, grown from about 10,000 in 1950, and lying mainly outside the urbanizing influences of the San Francisco metropolitan region [C.T. 366; Plaintiffs' Exhibit No. 1-3 at 2][3]. Petaluma adopted a general plan in 1962, which predicted substantial growth for the city. By 1985 the city forecast that its population would reach 67,400 persons, and that the city would provide services to an additional 9,600 persons outside the city limits, for a total of 77,000. [Plaintiffs' Exhibit No. 13 at 25].

During the 1960s, Petaluma developed in some ways as its 1962 general plan had predicted, increasing its housing stock by 60.8 percent. [Pretrial order, C.T. 366; Plaintiffs' Exhibit No. 1-8 at 5]. But the city did not develop the industrial and commercial tax base its 1962 general plan had forecast, and by the end of the 1960s, Petaluma's newer residents were in large part daily commuters to San Francisco and San Rafael. [Plaintiffs' Exhibit No. 1-5 at 11; Plaintiffs' Exhibit No. 1-8 at 10].

[3]Plaintiffs' Exhibits 1-5 and 7-10 to plaintiffs' complaint in this litigation were first marked at trial as Plaintiffs' Exhibits Nos. 1-5 and 7-10 [C.T. 82]. They were later marked as a single exhibit, Plaintiffs' Exhibit No. 1 [C.T. 158]. In this petition, Plaintiffs' Exhibit No. 1 and the separate exhibits within it are referred to jointly as, for example, "Plaintiffs' Exhibit No. 1-3," which means exhibit no. 3 in trial exhibit no. 1.

Family incomes rose quickly in Petaluma in the 1960s as the result of an influx of new residents who commuted to the industrialized center of the region and enjoyed the benefit of urban wages. Real disposable income per household rose in Petaluma almost twenty percent from 1960 through 1970. [Plaintiffs' Exhibit No. 1-8 at 9-10].

Housing costs in Petaluma during the 1960s remained reasonable, below prevailing costs in Santa Rosa and Novato, two nearby cities. [*Id.* at 7]. When Petaluma set out in 1970 and 1971 to limit the number of new residents, the city acknowledged the attractiveness of Petaluma to households of modest incomes and set about to frustrate "the large demand for relatively low-cost homes in the City." [*Id.* at 7-8]. Before Petaluma implemented its constraints against new residents, access to housing in many parts of the San Francisco region had already been virtually closed to families earning less than $12,000 a year, but "the Petaluma area still manages to offer this opportunity." [*Id.* at 8].

In 1970, Petaluma's rate of housing production substantially increased, reflecting the city's new role as an important suburb and housing supplier for the region. Yet, even this new rate of growth remained in phase with the 1962 projections for Petaluma's population in 1985. [R.T. 83, 100, 103-107, 111-114; C.T. 366; Plaintiffs' Exhibit No. 1-8 at 5].

In 1971 and 1972, the city enacted a plan that imposed a quota of 500 new dwelling units each year on housing construction in the city, which reduced by

one-half to two-thirds the amount of housing being produced to meet market demand.[4] [Appendix A at 4, 7.]

The Petaluma housing plan was ostensibly limited to five years, but no sooner was it passed than the city began to extend the plan by implication through at least 1990. The city attempted to disable itself from returning in five years to market-rate housing production by limiting its contractual draw of domestic water from the Sonoma County Water Agency, a major supplier of water to the city, and by purposely under-sizing its sewer treatment facilities. [District court findings nos. 10 and 13, Appendix A at 6-10].

No one has ever argued that all the values Petaluma has tried to protect or all the means turned to that end are unconstitutional or even unwise. Much of what Petaluma has attempted will, if administered fairly, increase the burdens on land owners and builders, but improve the process of urban development in the city. Petaluma's reliance on the planned unit development to gain greater control over the process of development from beginning to end, its insistence on a greater mix of single-family and multi-family development, and its attempt to use bonus points for low- and moderate-income housing[5], go unchallenged here.

[4]The court of appeals questioned whether the 500-unit quota was "misleading," because it applied to housing projects involving five units or more, exempting projects of lesser number. [Appendix B at 39]. However, Petaluma has always conceded that the 500-unit quota would, despite the exemption of four-or-fewer-unit projects, "limit growth during this [five-year] period to 2,500 new dwelling units or an average of 500 units annually." [Plaintiffs' Exhibit No. 1-5 at 1-2]. The court of appeals acknowledged that the four-or-fewer exception was not an issue in the case by assuming that the effect of the Petaluma plan was as the district court had found, to reduce housing production to less than "reasonably anticipated market demand." [Appendix B at 42]

The petitioners have argued from the beginnings of this litigation that the collision in this case is between important values, each deserving high regard and attention, and have urged that the vice of Petaluma's attempts to cure its problems is overbreadth and a failure to consider reasonable, less drastic, and valid alternatives to exclusion. Even the court of appeal accepted the district court's finding that the express purpose and effect of the Petaluma plan, as an end in itself, was to prevent new residents from settling in Petaluma.

Petaluma has not been consistent in its attempt to maintain its "small town character." It does not limit industrial or commercial development. Thus, the basis for the Petaluma plan appears not so much a refusal to grow, even at the loss of "smallness," but a refusal to grow in ways that do not maximize the city's tax

[5] The court of appeal suggested that the city's provision for bonus points to developers who submitted low-income housing projects was another "inclusionary" aspect of the city's plan. Of course, the plan did not mandate inclusion of low-income housing among the 500 units produced each year and placed the full burden for low-income housing production on each individual development. This simply imposed a public obligation on the developer and his limited number of consumers. The effects of the annual 500-unit limitation in driving up housing costs made this token provision for low-income housing a shadow against the glaring effects of constraining the supply of housing in the face of intense demand. [Appendix A at 7, 16-17.]

base and minimize its taxes, at the expense of outsiders, other cities in the region, and the quality of existing regional housing stock. [Appendix A at 16-17, 32-33.]

The district court found that Petaluma is part of an interactive regional housing market. People displaced from Petaluma do not disappear from the region, but present themselves in search of housing in other cities of the regional market. Communities faced with their own housing demand and the excluded demand of Petaluma retaliate with exclusionary laws of their own. The aggregate effect of proliferating housing-exclusion laws deprives the region of a substantial percentage of housing starts necessary to accommodate regional demographic changes and to maintain the quality of the region's current housing stock. [District court findings 14a and 14b, Appendix A at 10-11].

The district court found that one of the effects of the Petaluma plan would be a serious interference with interstate, intrastate, and foreign travel, as people trying to move into or within the San Francisco region found housing either financially unavailable or simply non-existent in reasonable supply or quality. [District court finding 14; Appendix A at 16]. As a consequence, the district court held that:

> the "Petaluma Plan" is an effort to avoid the problems that accompany contemporary trends in population growth. Through the plan, the defendants propose to address themselves to such problems by limiting the number of people who will henceforth be permitted to move into the city. The express purpose and the intended and actual effects of the "Petaluma Plan" have been to exclude substantial numbers of people who would otherwise have elected to immigrate into the city.[6]
>
> The plaintiffs do not challenge the legitimacy of the defendants' desire to deal with the problems of population growth but contend that the means which they have employed to accomplish their ends fall far short of constitutional validity. . . . [I]t is contended that the city has violated the people's right to travel. Considering the facts of the case, we agree.

[District court conclusion of law no. 2, Appendix A at 17-18].

The district court limited its holding to "the only issue presented here, for the first time, [that is] . . . whether or not a municipality may claim the specific right to keep others away." [Conclusion of law no. 10, Appendix A at 31]. The district court reassured the city that it did not intend to limit "traditional efforts" at zoning and other forms of land-use controls. However, the district court noted that the city showed signs of evading the spirit of the court's decision and provided for the appointment of a federal master to observe the extent of the city's efforts at compliance with the court's judgment. [Appendix A at 31-35]

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[6]The court of appeals concluded that Petaluma's encouragement of multi-family and low-income housing made the city's plan unique despite its limitation on the number of housing units produced. [Appendix B at 50 n. 10]. The court even characterized the plan at one point as "inclusionary," rather than exclusionary, despite the court's acknowledgement of the substantial and regressive local and regional impact of the city's artificial constraints on housing supply. [Appendix B at 55 n. 16, 56]. The court concluded that even though the plan "may frustrate some legitimate regional housing needs, the Plan is not arbitrary or unreasonable." [Appendix B at 56].

While an appeal to the ninth circuit was pending, former Justice Douglas granted a stay of the district court's order and injunction. [Order of September 18, 1974, No. A.-1298]

REASONS FOR GRANTING THE WRIT

1. **The decision of the court of appeals denying petitioners standing to assert the interests of prospective residents of Petaluma creates a confusing and unnecessary test for derivative standing and conflicts with decisions of this court and other courts of appeals.**

The court of appeals has seriously misunderstood the showing necessary for petitioners to invoke the interests of housing consumers, prospective residents of Petaluma. The court of appeals requires that some out-of-court "special, on-going relationship" between the petitioners and prospective residents of Petaluma be demonstrated before petitioners may assert consumer interests with their own.

Having made an extra-judicial relationship essential to derivative standing, the court of appeals takes a mechanistic and unnecessarily narrow view of that relationship. The court states that housing suppliers and consumers are joined in this case only by "the possibility that but for the [Petaluma] Plan they would be parties to a purchase-sale agreement." [Appendix B at 47].[7]

[7]The court of appeals suggested the petitioners had "attempted to align their business interests in attacking the Plan with legitimate housing needs of the urban poor and racial minorities," but found that the plan did not have the effect of excluding "poor persons and racial minorities." [Appendix B at 55 n. 16] The court failed to take account of the obvious community of interest

In a single sale by one builder to one purchaser, only a contractual community of interest may join them. But in the larger sense of two classes of potential litigants vitally interested in an open housing market, builder and buyer have an intense and continuing mutual objective, which led the Court of Appeals for the Eigth Circuit to characterize their relationship as "not only *sufficiently* close . . . but intimately close." *Park View Heights Corp. v. City of Blackjack,* 467 F.2d 1208, 1213-1214 (8th Cir. 1972). See, also, *Golden v. Planning Board of Town of Ramapo,* 30 N.Y.2d 359, 334 N.Y.S.2d 138 (1970), *appeal dismissed,* 409 U.S. 1003 [due process and mobility issues inseparable].

The court of appeals attempted further to diminish the link between builder and buyer by commenting that there was no present contractual agreement between the petitioners and any prospective purchasers of Petaluma housing. The court did not explain how builders or landowners could have as yet made contracts to sell or rent housing, when the very legislation at issue prevents that housing from being constructed.[8]

against exclusionary laws between builders and people in search of housing. The district court made elaborate findings on the very serious impact the Petaluma plan has on persons of low income, not only in drying up supplies of new housing, but in depriving the poor of a traditionally important source of shelter, which is used but decent housing vacated by persons of rising incomes and upward mobility. [Appendix A at 11, 14-17] The court of appeals ignored those findings, apparently because petitioners in the court's view lacked standing to raise the rights of consumers.

[8]*Warth v. Seldin,* 45 L.Ed.2d 343, 360 n. 18 (June 25, 1975) held that consumers excluded from a community need not show for federal standing that they have a present contractual interest in a particular project.

When the issue is whether one may assert the rights of another against a specific law, and only for that purpose, the relevant inquiry is to discern how wisely and well the named plaintiff will advance the cause of the absent third person, how unlikely it is that the absent party will be able to assert his own rights in another forum, how seriously diluted the absent party's rights might be if the challenged law is enforced against him, and whether the named plaintiff may himself be seriously affected if he cannot assert third-party rights, *e.g.*, when the named plaintiff has no defense to enforcement of the law except the rights of others. It is this relationship vis-a-vis the challenged law between named plaintiffs and third persons, and not the presence or absence of other factors outside litigation, that has gradually formed the key to derivative standing in this court and other courts of appeals, and thus put the Court of Appeals for the Ninth Circuit athwart the path of the law.

In *Pierce v. Society of Sisters,* 268 U.S. 510, a private school whose existence was threatened by mandatory public education laws was permitted to assert its own economic interests and the associational rights and educational preferences of its students and their parents. The court's focus was on the mutual threat to private education the school and students faced from the laws, not upon the nature or permanence of the school's contract to teach individual students. In *Barrows v. Jackson,* 346 U.S. 249, and *Sullivan v. Little Hunting Park,* 396 U.S. 229, parties with only a fleeting contractual relationship were joined in antipathy to a racial barrier, one as

the minority person directly offended by racial bias, the other as the party against whom civil remedies were asserted for violating a racial covenant. In *Griswold v. Connecticut,* 381 U.S. 479, and *Doe v. Bolton,* 410 U.S. 179, doctors were permitted to assert rights of their patients against anti-contraception and anti-abortion statutes, not out of an analysis of the professional relationship of patient and physician, but from proof of the regressive impact of the laws on both parties. In both cases, the doctors' only defense was derived from the rights of their patients, since the doctors were otherwise in violation of the statutes. See, also, *Edwards v. California,* 314 U.S. 160; *Memorial Hospital v. Maricopa County,* 415 U.S. 250; R. A. Sedler, *Standing to Assert Jus Tertii in the Supreme Court,* 71 Yale L.J. 599, 626-628 (1962).

Other courts of appeal have been satisfied for derivative standing with the relationship of supplier and consumer in a number of contexts, if sufficient identity of interests in the litigation was shown. In *Park View Heights Corp. v. City of Blackjack,* 467 F.2d 1208 (8th Cir. 1972), the court permitted housing producers to raise the interests of minority and low-income housing consumers against discrimination. The second circuit permitted travel agents to assert the interests of travelers against CAB affinity group regulations and bar owners to raise the claims of their patrons against anti-topless dancing ordinances. *CAB v. Carefree Travel, Inc.,* 513 F.2d 375 (2d Cir. 1975); *Gajon Bar and Grill, Inc. v. Kelley,* 508 F.2d 1317 (2d Cir. 1974). The seventh circuit permitted hospitals to assert patients' rights to abortions. *Friendship Medical Center,*

Ltd. v. Chicago Board of Health, 505 F.2d 1141 (7th Cir. 1974).

In all of these decisions, an out-of-court relationship is either absent, of little consequence, or never considered by the court, yet standing is permitted to assert third-party rights.

The court of appeals holds out the possibility that housing consumers might file their own actions against the Petaluma plan. But no prospective purchaser of housing in Petaluma can prove that he has been excluded from the city. The city permits 500 units to be built each year, and theoretically any single purchaser would be a candidate for one of the permitted units. In this way, each named consumer plaintiff could be said to lack the requisite "direct injury" for standing. Even a formal organization of such plaintiffs would fail to show direct injury unless it reached a membership of more than 500 households; and then it could be argued that those members who do not buy housing this year may be able to buy it next year. Yet, throughout so strained an inquiry, it would be clear that as a class *all* prospective residents of Petaluma have suffered serious, substantial, and regressive effects from Petaluma's constraints against housing, because each member has been put at hazard by the Petaluma quota.

The court of appeals states that the "complex economic, political and social factors involved in this case are compelling evidence that resolution of the important housing and environmental issues raised here is exclusively the domain of the legislature." [Appendix

B at 57 n. 17]. It is as much the court of appeals' apparent belief that complex urban law cases are non-justiciable, as the court's draconian law of standing, that bodes ill for any challenge to housing exclusion laws in the ninth circuit. This court has said in *Warth v. Seldin* that judicial review of zoning laws will be available "in a proper case." 45 L.Ed.2d at 360, n. 18; see also, *Milliken v. Bradley,* 418 U.S. 717, 755 (Stewart, J., concurring). The court of appeals has translated *Warth* into a closed-door policy, which will never admit of judicial review.

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2. The decision of the court of appeals to review an admittedly exclusionary land-use ordinance only for a "rational basis," and not on some higher and stricter standard, conflicts with decisions of this court and courts of last resort in the several states.

The district court carefully limited itself to "the only issue presented here, for the first time, . . . whether or not a municipality may claim the specific right to keep others away." The court held that the Petaluma plan violated the right of migration and settlement of prospective residents of Petaluma and held the city to the burden of demonstrating a compelling state interest to justify interference with that right. [Appendix A at 31-32]. The district court assured the city that the court did not intend to interfere with the panoply of zoning powers that when not abused and distorted to prohibited purposes are the means traditionally reserved to local government to solve the pervasive problems of urban development.

The court of appeals has broken away from a fundamental policy of our people, that "the Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the people of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Edwards v. California,* 314 U.S. 160, 174. The power to exclude citizens from free movement and settlement, absent compelling considerations and less offensive alternatives, has never before been so outspokenly claimed by any court of which petitioners are aware.

The court of appeals held that "practically all zoning restrictions have as a purpose and effect the exclusion of some activity or type of structure or a certain density of inhabitants." [Appendix B at 51]. Since a zoning restriction may have some ascertainable effect of impeding unrestricted mobility, the court of appeals reasoned that a zoning regulation that had *no other purpose* than to exclude new residents was not *per se* invalid or subject to more than minimum judicial scrutiny.

The decision of the court of appeals is in conflict with prior decisions of this court and several state courts of last resort.[9]

In *Edwards v. California,* this court overturned a state law that attempted to isolate the state from

[9]Conflict between federal courts of appeals and state courts of last resort on federal law is an important basis for review in this court. *Barrows v. Jackson,* 346 U.S. 249, 252; R. L. Stern & E. Gressman, *Supreme Court Practice* § 4.9 (4th ed. 1969).

interstate migration of indigents. While reaffirming a spirit of deference to state legislation to solve difficult issues, this court emphasized that its deference "does not mean that there are no boundaries to the permissible area of State legislative activity. There are. And none is more certain than the prohibition against attempts on the part of a single State to isolate itself from the difficulties common to all of them by restraining the transportation of persons and property across its borders." 314 U.S. at 173. This court has yet specifically to apply the right of migration and settlement to solely intrastate movement. The court has carefully refrained from holding that intrastate movement is not protected and has struck down laws that deterrred or penalized mixed interstate and intrastate movement, such as the district court found was affected in this case. *Memorial Hospital v. Maricopa County,* 415 U.S. 250.

This court has often been required to draw lines and distinctions between traditional legislative efforts entitled to substantial deference and legislation offensive to fundamental values. Several state courts of last resort have established similar limits in judging the efforts of communities to isolate themselves from urban growth and expansion.

In *Appeal of Girsh,* 437 Pa. 237, 263 A.2d 395 (1970), the Pennsylvania Supreme Court held that "a zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities cannot be held

valid." 263 A.2d at 397. See, also, *Appeal of Kit-Mar Builders,* 439 Pa. 466, 268 A.2d 765 (1970), and *National Land & Inv. Co. v. Kohn,* 419 Pa. 504, 215 A.2d 597 (1965).

In *Golden v. the Planning Board of Town of Ramapo,* 30 N.Y.2d 359, 334 N.Y.S.2d 138 (1970), *appeal dismissed,* 409 U.S. 1003, the New York Court of Appeals, in dealing with the Ramapo phased growth plan, stated that "though the issues are framed in terms of the developer's due process rights, those rights cannot, realistically speaking, be viewed separately and apart from the rights of others 'in search of a [more] comfortable place to live.'" 30 N.Y.2d 359, 375, 334 N.Y.S.2d 138, 149. Having suggested that its analysis was based on the right of personal mobility and settlement, the court of appeals subjected the Ramapo plan to intense scrutiny, brushing past recitals of legislative intent "regardless of their professedly beneficent purposes."

> There is, then, something inherently suspect in a scheme which, apart from its professed purposes, effects a restriction upon the free mobility of a people until some time in the future when projected facilities are available to meet increased demands. Although zoning must include schemes designed to allow municipalities to more effectively contend with the increased demands of evolving and growing communities, under its guise, townships have wont to try their hands at an array of exclusionary devices in the hope of avoiding the very burden which growth must inevitably bring. [Citations omitted.]

> We will not countenance, then, under any guise, community efforts at immunization or exclusion. But, far from being exclusionary, the present amendments merely seek, by the implementation of sequential development and timed growth, to provide a balanced cohesive community dedicated to efficient use of land . . . and a bona fide effort to maximize population density consistent with orderly growth. . . .

30 N.Y.2d 359, 375, 378, 334 N.Y.S.2d 138, 149-150, 152.

In *Southern Burlington County NAACP v. Township of Mt. Laurel,* 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed,* 46 L.Ed.2d 28 (1975), the Supreme Court of New Jersey imposed on all growing cities—those with an obvious and major part to play in providing housing in a regional setting—an absolute obligation to absorb fair shares of housing, notwithstanding arguments by the township that would have easily passed muster under a traditional "rational basis" test. For example, the court refused to accept arguments that the added fiscal burdens on the city that new housing and a demand for services produce are sufficient to permit the city to turn aside a fair share of housing demand. See, also, *Memorial Hospital v. Maricopa County,* 415 U.S. 250 [political difficulty of financing indigent medical care is not a compelling state interest for infringing right of migration].

The gradual development of our law, to impose more intense review on cities involved in the use of land-use controls to disturb demographic patterns,

seems to have evolved to meet the pervasive tendency of cities in every metropolitan region to attempt to shift the burden of providing housing to some other city in the region. There seems little choice but to impose a high degree of scrutiny on land-use plans that deter migration and settlement for their own sake. As Robert Freilich, the author of the Ramapo plan, has said:

> Despite its recent notoriety, the exclusionary use of zoning was first noted in the lower court's opinion in *Ambler Realty*, discussed by Norman Williams during the fifties, and brought to national attention in 1968 by the Douglas Commission Report, Building the American City. This report showed that zoning has regrettably become more a regulation for ulterior economic and social motives than a device of planning for the sound and orderly development of communities. While this is in part due to the parochial views of many communities adopting zoning, to a large extent it is also due to judicial decision making....The result has been an inward set of restrictions adopted to abet a municipality's fiscal and social views without regard to the effect of the policies on the urban society.

R. Freilich & G. Bass, *Exclusionary Zoning: Suggested Litigation Approaches,* 3 The Urban Lawyer 344, 346-347 (1971).

3. In a metropolitan housing market, exclusionary measures taken by one city increase burdens on other cities, frustrate efforts to find housing, and cause a decline in the quality of the region's housing. No metropolitan city may legislate for "the general welfare" without considering the impact of its land-use laws outside its borders.

The court of appeals agreed that "unlike the situation in the past most municipalities today are neither isolated nor wholly independent from neighboring municipalities and that, consequently, unilateral land use decisions by one local entity affect the needs and resources of the entire region. . . . It does not necessarily follow, however, that the *due process* rights of builders and landowners are violated because a local entity exercises in its own self-interest the police power lawfully delegated to it by the state." [Appendix B at 56-57] The district court had carefully analyzed the complex and substantial effects of the Petaluma plan on the San Francisco region, and the court of appeal conceded that the plan "may frustrate some legitimate regional housing needs." Yet the court of appeals virtually invited the city to extend indefinitely its exclusionary plan beyond the original five-year term. [Appendix B at 56, 57 n. 17]

The court of appeals' refusal to consider the regional impacts of the Petaluma plan, as affecting Petaluma's duty to consider the regional general welfare, is in conflict with decisions by several state courts of highest resort. It also offends this court's decision of fifty years ago in *Euclid v. Ambler Realty Co.,* 272 U.S. 365, 387, which held open the possibility that greater public rights than those of one town might

require a court to set aside the deference ordinarily given to local land-use legislation.

In *Southern Burlington County NAACP v. Township of Mt. Laurel,* 67 N.J. 151, 336 A.2d 713 (1975), *appeal dismissed,* 46 L.Ed.2d 28 (1975), the New Jersey Supreme Court held that "the general welfare which developing municipalities like Mt. Laurel must consider extends beyond their boundaries and cannot parochially be confined to the claimed good of the particular municipality." 336 A.2d at 727, 728. The court held that it is the obligation of each growing city in a metropolitan region, much like the "growth centers" identified by the district court opinion in *Petaluma,* "to meet the needs, desires, and resources of all categories of people who may desire to live within its boundaries. . . . [I]t may not adopt regulations or policies which thwart or preclude that opportunity." 336 A.2d at 728.

In *Berenson v. Town of New Castle,* ..... N.Y.2d ..... (No. 430, December 2, 1975), the Court of Appeals for New York held that

> in enacting a zoning ordinance, consideration must be given to regional needs and requirements. It may be true, for example, that New Castle already has a sufficient number of multiple-dwelling units to satisfy both its present and future populations. However, residents of Westchester County, as well as the larger New York City metropolitan region, may be searching for multiple-family housing in the area to be near their employment or for a variety of other social and and economic reasons. There must be a balancing

> of the local desire to maintain the status quo within the community and the greater public interest that regional needs be met. Although we are aware of the traditional view that zoning acts only upon the property lying within the zoning board's territorial limits, it must be recognized that zoning has a substantial impact beyond the boundaries of the municipality . . . [and] the court . . . should take into consideration not only the general welfare of the residents of the zoning township, but should also consider the effect of the ordinance on the neighboring communities.

[Slip opinion at 8.]

The New York Court of Appeals in *Berenson* specifically considered whether it was exclusively a legislative task to require that local communities observe a larger sense of general welfare and, rejecting that notion, said that "until the day comes when regional, rather than local, governmental units can make [land-use] determinations, the courts must assess the reasonableness of what the locality has done." [Slip opinion at 9.]

In *Appeal of Girsh,* 437 Pa. 237, 263 A.2d 395 (1970), *Appeal of Kit-Mar Builders,* 439 Pa. 466, 268 A.2d 765 (1970), and *National Land & Inv. Co. v. Kohn,* 419 Pa. 504, 215 A.2d 597 (1965), the Pennsylvania Supreme Court held that no community in a larger regional housing market could attempt to isolate itself from inevitable demographic demands simply by observing the wishes of its current residents. The court required communities in a metropolitan

setting to take a regional view of their land-use laws. The court described the very substantial damage that could be done if parochial local land-use decisions proliferated throughout the region.

In *Christine Bldg. Co. v. City of Troy,* 367 Mich. 508, 116 N.W.2d 816 (1962), a minimum lot size restriction was challenged as unrelated to the general welfare. The city defended the restriction on the grounds that it had adopted a sewer plan for the general area to serve a fixed population of 21,300 people in the year 2000 and then zoned its land to limit population to that figure. The Michigan Supreme Court overturned the ordinance, holding that a city might ignore the needs of a regional population seeking entry to the city if there were a present danger affecting public welfare, but not otherwise. The City of Troy's efforts to disable itself from serving the needs of an expanding population were very much like Petaluma's limiting its water and sewer facilities to prevent indefinitely any attempt to resume former rates of housing production.

California has recognized that local zoning decisions may have an impact outside the zoning municipality and requires that nearby landowners be given notice and the opportunity to be heard in zoning decisions that affect their interests. *Scott v. Indian Wells,* 6 Cal.3d 541, 99 Cal.Rptr. 745 (1972). The due process rights of non-resident landowners, which the court of appeals refused to consider, seem indistinguishable from the interests of prospective residents of a city substantially affected by its exclusionary zoning laws.

Other states have required that consideration be given to the interests of outsiders in legislating within municipal boundaries. *Simon v. Needham,* 311 Mass. 560, 42 N.E.2d 516 (1942); *Board of County Supervisors of Fairfax County v. Carper,* 200 Va. 653, 107 S.E.2d 390 (1959); *City of Newport v. Horton,* 22 R.I. 196, 47 A. 312 (1900).

The duty to consider the views of outsiders arises from a number of compelling considerations. We have always been a restless and mobile people, to whom the freedom to resettle in other parts of the land is fundamental and necessary. *Edwards v. California,* 314 U.S. 160; Tocqueville, *Democracy in America* 284-285 (Doubleday-Anchor ed. 1969); F. Turner, *The Frontier in American History,* 2, 37 (1920).

> There is . . . an ideal involved, that of respecting the free choice of Americans to move in search of a better job or a better life. Mobility has been a traditional road to opportunity in America. Wholesale growth restrictions imposed by many communities could block that road for the many who still want to travel it. . . . Now, however, growth restrictions are being considered in many areas—and implemented in a few. . . . Some seem but the latest trick to keep the "good life" to oneself. Some are transparent efforts to exclude specific groups of "immigrants." . . .
>
> Communities must be aware of prohibiting too much, though, for the right of mobility is clear not only in tradition but in law. . . . Clearly, the courts are going to be asked to draw, with some precision, the line between legitimate protective regulations and improper restrictions on growth

and mobility. The line they draw—and the responsive measures adopted by governments as that line becomes clearer—will have a major influence on how and where we grow.

The issue is not whether there will be urban regions but what form they will take, for we are convinced that the urban region is a fact of life. . . .

The Use of Land: A Citizen's Guide to Urban Growth, 18, 88, 98, 100 (Rockefeller Bros. Trust Fund, 1973).

There is, furthermore, the sad but now recognized tendency of many suburbs to discourage residential migration, because they see in industrial and commercial growth, but not in new housing, a means of relief from heavy local tax burdens.

In the midst of a mobile and expanding population, local governments represent the people already there. Prospective residents, who may be destined to double or treble the population of the community, do not live within local boundaries and therefore do not vote. The local government thus speaks for the people who got there first.

Many of these first arrivals have recognized for years that additional development has little to offer them. Some suburbs have engaged in a curious inter-municipal competition in which development (particularly low- or moderate-income housing) has been perceived as the common enemy, threatening to overrun the weak or inattentive locality. Municipal efforts to combat the threat have resembled nothing so much as competitive dike-building by neighboring landowners, each hoping that his higher dikes will keep the

floodwaters off his own land and drive them onto his neighbors' instead. Even ten or fifteen years ago, local officials would privately explain that a new zoning amendment increasing minimum lot sizes was at least partly intended to keep up with the requirements in a neighboring town.

Id. at 225-226.[10]

This court has recently indicated its willingness to review zoning laws in a proper case. *Warth v. Seldin,* 45 L.Ed.2d 343, 360 n. 18 (1975). The court has established a policy that before it will cross political boundaries to impose metropolitan solutions, some proof must be made out that those who are brought unwillingly into the solution contributed to the problem. *Milliken v. Bradley,* 418 U.S. 717, 755 [Stewart, J., concurring].

The court may in this case take a modest step, not only to settle the conflict among the court of appeals and the several states over the appropriate definition of the general welfare in a metropolitan setting, but in preventing confrontations between suburbs, builders, non-residents, and other communities. The court may by adopting a regional definition of the general welfare require that cities take into account the extra-territorial impact of their land-use laws before those laws are enacted.

The court of appeals has left Petaluma and other suburbs free to withdraw indefinitely from the task

[10]See, also, J. Ukeles, *The Consequences of Municipal Zoning,* (1964); N. Williams & T. Norman, *Exclusionary Land-Use Controls: The Case of North-Eastern New Jersey,* 22 Syracuse L. Rev. 475 (1971); *Equal Opportunity in Suburbia* 42 (U.S. Civil Rights Comm., 1974).

of insuring adequate housing in a society in which private industry, not the state, is the major source of shelter. By demeaning the part that the private building industry plays in housing—in its limitations on standing and in denigrating the duty of a city to consider "land owners' or builders' " rights—the court of appeals has sadly misunderstood that for better or worse housing in America is privately produced. Yet, in this case, it is the interests of consumers and of a mobile population that the district court considered and the court of appeals ignored, and this court should say emphatically that the district court's emphasis was not misplaced.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

MALCOLM A. MISURACA,

JAMES L. BEYERS,

Counsel for Petitioners.

December 21, 1975.

(Appendices Follow)

APPENDIX

Appendix A

[375 F.Supp. 571]

United States District Court
Northern District of California
Lloyd H. Burke, District Judge

No. C-73-663

Date April 26, 1974

Construction Industry Association of Sonoma County etc., et al.,
Plaintiffs,
vs.
The City of Petaluma, a California charter city,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action was heard without a jury from January 14 through January 18, 1974. Arata, Misuraca & Clement, Malcolm A. Misuraca, James L. Beyers, Craig M. Thomas and Joseph Joiner, of counsel, appeared for the plaintiffs. Sturgis, Den-Dulk, Douglass & Anderson, Robert Anderson and Edouard E. Robert, of counsel, appeared for the defendants. The action was tried, submitted without argument; and the court

made its oral decision (in favor of plaintiffs) at the conclusion of trial. The court finds from the evidence that:

Findings of Fact

1. The city of Petaluma, California, is within modern-day commuting distance of San Francisco and is a part of the San Francisco Bay Area metropolitan region. Until recently, Petaluma was known primarily for its dairy and poultry resources.

2. The defendants, Helen Putnam, Robert A. Brunner, John W. Cavanaugh, Robert A. Daly, James L. Harberson, Fred V. Mattei, and William A. Perry, are the members of the Petaluma City Council. All elements and employees of the defendant city are under their control.

3. Through the early 1960's Petaluma's government operated under the prevailing assumption that "growth is good." Its planning provided generously for housing "developments" and eventually permitted the eastern portion of the city to become densely populated by a sea of tract homes. Growth was uncontrolled.

4. In 1962, the city officials of Petaluma studied its growth patterns and concluded that, if current trends continued, by 1985 the city would have a population of 77,000; it would cease to be a "rural" community. Subsequent growth rates confirmed the predictions; and Petaluma's population increased dramatically until the early 1970's. From 1964 through 1971, the following numbers of housing units were completed in Petaluma:

1964	270	1968	379
1965	440	1969	358
1966	321	1970	591
1967	234	1971	891

5. In 1970 and 1971, the city approved approximately 2,000 units for future construction. This number of units represents the fair measure of the market and demographic demands for housing in Petaluma. Since the 1970-1971 period, market demand has been and continues to be substantially in excess of five hundred units per year.

6. With the accelerated growth figures of 1970 and 1971, the citizens of Petaluma began to question earlier judgments about the desirability of growth for its own sake; and they set about quite openly to curb the population growth in their city. In early 1971, a "citizen's committee", aided by a firm of professional planners, drafted a suggested "policy on growth" for Petaluma. One tool used in arriving at their statement of policy included the sending of questionnaires to approximately 10,000 residents of the city. The great majority of the returned questionnaires indicated that the citizens of Petaluma wanted to limit the increase of future residents.

7. In accordance with growing community sentiment, the city council adopted an official development policy in June, 1971, the policy statement itself having been the one drawn up by the citizens' committee and the city planning staff. The statement, entitled "Official Statement of Development Policy for the City of Petaluma", reflected the local sentiment expressed above. As a preamble the statement asserted that

"In order to protect its small town character and surrounding open spaces, it shall be the policy of the City to control its future rate and distribution of growth . . ."

8. The city council implemented the official growth policy of June, 1971, and adopted the "Petaluma Plan," which includes, among other items, the following ordinances:

(a) Environmental Design Plans and Maps, Petaluma Resolution No. 6008 N.C.S.

(b) A Residential Development System, Petaluma Resolution No. 6113 N.C.S.

(c) The Petaluma Housing Element, Petaluma Resolution No. 6126 N.C.S.

(d) A proposed breakdown of approximately 2,500 units to be allocated by the plan for the years 1973 through 1977.

(e) Rules and Regulations for business of the Residential Development Board (the "RDEB").

9. The city council intended in enacting the "Petaluma Plan" to limit Petaluma's demographic and market growth rate in housing and in the immigration of new residents. The plan did have the intended effect in a number of respects, of which the following are the most significant:

(a) The city limited new housing units to approximately one-third to one-half of the demographic and market demand of the 1970-1971 period.

(b) The city created an "urban extension line," i.e., an ultimate boundary intended to mark the outer

limits of the city's expansion for twenty or more years. Within this perimeter, the city used density limitation and other techniques to set a maximum population of the city at approximately 55,000 as against the 1962 projection of 77,000 by 1985. Such a limitation is a substantial interference with demographic and market demand for housing and the immigration of new residents. The 1962 general plan estimate of 77,000 residents in 1985 was a reasonable estimate of those demands on the housing market, and it continued to be reasonable in 1970 and 1971.

(c) The area within the "urban extension line" was sufficient at the city's chosen densities for growth for the twenty year planning period only at the 500 unit annual limitation, not at natural demographic and market demand rates. The effect of the "urban extension line" is to limit "excessive" population growth, which limitation was the defendants' purpose. If the 500 unit rate limit were removed, the limit on population set up by the "urban extension line" would still act as a substantial deterrent to travel and commerce.

(d) The city refused, for fifteen or more years, to annex or to extend city facilities to land outside the "urban extension line." The city solicited the assistance of the county and the Local Agency Formation Commission ("LAFCO") to prohibit residential growth outside of the "urban extension line." Thus, the extension line inhibited immigration not only into Petaluma, but also into its surrounding areas.

(e) Permits for the building of the limited number of units are granted and/or evaluated by the resi-

dential development evaluation board (the "RDEB"). The rating system employed is an intricate one, which establishes a competitive situation between the proposed applications. Although we do not understand plaintiffs to attack the rating concept itself, they do contend that the application of this particular system's terms resembles a "Catch-22" type of operation; apparently nobody really knows what regulations will be applied, or how, or by whom. Plaintiffs argue that the merit rating system, as employed by these defendants, is actually a hazing system intended to discourage unwanted builders from acquiring permission to build.

10. Although the defendants contend that the "Petaluma Plan" is intended to last only through 1977, official attempts have been made to perpetuate the plan through 1990 at least. Such attempts include the annual 500 unit building limitation, the urban extension line, and the limitation of available facilities. For example, the city has purposefully limited its contract with the Sonoma County Water Agency, a major supplier of water to the city, to 9.8 million gallons of water per day through the year 1990. This flow is sufficient for a population of 55,000. By limiting its public facilities, the city intended to serve a population lower than the market and demographic growth rates would produce, to restrict the travel of new residents into Petaluma, and consequently to limit the number of housing units that might be constructed.

11. Housing in Petaluma and elsewhere in the San Francisco metropolitan region is produced substantially through goods, services and communication devices in interstate commerce.

12. The "Petaluma Plan" prevented the construction of approximately one-half to two-thirds of housing units that market and demographic growth forces would have demanded for Petaluma during the 1973-1977 period and the subsequent extension of the plan into 1990. The people in need and desirous of housing were and will be forced to turn to other areas within the region for accommodation. Such persons consist of Californians as well as out-of-state immigrants.

13. Although defendants contended that, as a matter of law, this court may not inquire into the motives for the implementation of the growth limitation policy, they have introduced evidence which is designed to prove that the growth curbs were imposed because of the inadequacy of the city's water and sewage treatment facilities and not to keep others from moving into Petaluma. Without intending to resolve the initial legal position taken on the point, we find that the assertions made are not true.

When the "Petaluma Plan" was conceived in 1971, the city faced no immediate, serious or unusual difficulty in using or expanding the capacity of its public facilities to serve existing demographic and market growth rates in housing. The city could have continued to meet the demands on such facilities made by the growth rate trends of 1970 and 1971 without unusual strain upon such facilities. The city's reference to such alleged inadequacies is no more than an excuse intended to justify the "Petaluma Plan" after

its adoption. Specific findings on sewer and water facilities follow:

(a) The city determined in 1965 to add to the capacity of its existing sewage treatment plan, which was first constructed in 1938, then expanded and reconstructed from time to time. In 1965 it had a capacity of 1 million gallons per day for secondary sewage treatment. Between 1965 and 1968, new construction increased the capacity of the facilities to 2.6 million gallons of sewage per day. In wet months the facilities could handle up to 14 million gallons per day, a combined demand of sewage and storm water.

(b) In planning the 1968 addition to the treatment facilities, the city used inaccurate growth projections; and although the ultimate treatment capacity of the 1968 plant could be expanded to 14 million gallons per day, it was limited to 2 million gallons per day. The city later found that the additional facilities actually increased capacity to 2.6 million gallons per day. The combined capacity of the 1938 and 1968 facilities would not indefinitely keep pace with the growth trends reflected in the 1962 projections, but they were fully capable of being augmented to handle up to 14 million gallons of sewage treatment per day in the 1968 plant.

(c) In 1973, the city began to increase its capacity to treat sewage to 7 million gallons per day. The expansion is to be available in July, 1975.

(d) Based upon city sewage treatment reports which indicate that the per person per day burden on the treatment facilities amounts to between 50 and

100 gallons, the city currently has the capacity to serve approximately 6,000 to 12,000 more persons.

(e) The city is able, at the present time, to return to absorbtion of existing market and demographic growth rates without exceeding the capacity of city facilities. Such facilities are either now in place, under construction, or capable of being augmented by new capacity and at all times will be adequate for anticipated real demographic and market demands.

(f) Nor can the city accurately claim that it currently exceeds regional water quality control standards. Although the water quality control board for the San Francisco Bay Region has required the city ultimately to cease the discharge of treated sewage into the Petaluma River, a schedule has been adopted for the shifting of the point of discharge. Petaluma may easily meet the new discharge standards without disturbing demographic and market residential growth rates. Moreover, the State of California and the federal government have stipulated that the city is in conformance with all applicable water quality standards in its waste water treatment facilities.

(g) The city's water supply is substantially drawn from the Russian River through the Sonoma County Water Agency. The city's demands upon agency sources range between 4.7 million gallons per day in peak summer months, to about one-half that amount in the winter months.

(h) The city controls its water service and has a surplus in excess of $3,000,000 in water funds. The city is currently negotiating the placement of wells in

nearby communities for interim use, until the Russian River-Cotati intertie is completed in 1976. The intertie will furnish a substantial amount of additional water to Petaluma.

(i) Petaluma has requested a 9.8 million gallon per day supply of water from the Russian River-Cotati intertie, which, as mentioned above, is to be completed in 1976. Such a request, though not limited by the supplying agency, represents the amount of water which would be necessary through the year 1990, if Petaluma's population limitation plan were to remain in effect. The city may expand its contract by request, and a surplus in the intertie exists for expansion of water supplies into Petaluma.

(j) Since, as well as the intertie, other additional supplies of water will be available in the future, the city is well able to expand at market and demographic rates without a crisis in its water supply.

(k) The city has not established that any of its other facilities is in any way threatened by residential growth at market or demographic rates.

14. Although the parties disagree as to the relevance of the matter, the following findings relate to the probable effects of the growth limitation policy in dispute and the probable effects if such a policy were to spread to the remaining municipalities of the San Francisco metropolitan region.

(a) The San Francisco metropolitan region is generally self-contained and has a unitary housing market. Persons excluded from one suburb do not leave

the region but seek housing elsewhere in the area. Where suburbs not practicing exclusionary growth limitation are forced to absorb not only their own "share" of the population growth, but also the excluding suburb's as well, they tend to retaliate by adopting exclusionary measures of their own. It is appropriate to measure the potential effects that the exclusion practiced by Petaluma would have if it proliferated throughout the region itself.

(b) Limits on the supply of housing in one part of a regional market create increased demand for housing elsewhere in the area. Other areas then have incentives to limit housing.

(c) Limiting housing in the face of static or rising demand increases the cost of private housing and the rent structure of tenant housing. This increase is equally applicable in both the area practicing the exclusion and elsewhere in the region where the rejected demand is felt.

(d) Limits on housing supply in the suburbs tend to keep people who would otherwise move to those suburbs in the center cities.

(e) In any given period, a certain percentage of existing housing is in need of replacement, either because it is obsolete or substandard or because it is destroyed or damaged beyond repair.

(f) If the total housing demand in such a region be frustrated by a policy that limits the supply of housing to less than demand, certain results will inevitably follow. Substandard and obsolete housing which

should be replaced will remain in the market to deal with the high demand and will partially fill it with low quality structures. The overall nature of the region's housing stock will decline. Tenant housing is as subject to this phenomenon as privately owned and occupied housing. Landlords will discover that they may leave substandard housing in the rental market and may ignore its need for maintenance and rehabilitation without suffering high vacancy rates, demand for such housing being unnaturally high.

(g) Growth throughout a metropolitan region takes place unevenly in certain "growth centers," areas having unused capacity which can be tapped or the ability to augment capacity to serve new residents.

(1) Petaluma is such a growth center for the San Francisco metropolitan region.

(2) Such centers serve, among other things, as residential centers for people who work elsewhere in the center cities complex, in other suburbs or in other job centers.

(3) Residential growth in such centers, though larger than in some other cities in the region, is not disproportionately larger in the sense that market, economic, demographic and other forces within the region dictate that growth shall occur in substantial part in growth centers.

(h) If such growth centers curtail residential growth to less than demographic and market rates, as has been attempted in the present case, serious and damaging dislocation will occur in the housing mar-

ket, the commerce it represents, and in the travel and settlement of people in need and in search of housing. Even in cities in the region that do not qualify as "growth centers," the same exclusion of residential growth would lead to substantially the same adverse consequences, if the exclusion were region-wide.

(i) The public facilities, land, existing social advantages and access to the center cities and to other job centers that growth centers offer to a metropolitan region in need of housing cannot be adequately placed elsewhere to support local and regional housing needs. Although "new towns" could be constructed where none already exists, the initial cost would be prohibitive to build infrastructure, i.e., the basic public facilities necessary to serve the town. Experience in "new town" development has proved that the "front-end facilities cost" in new towns makes them impractical, at least as a source of housing for low and moderate income groups.

(j) It is impossible to force housing out of growth centers and into rural areas, without providing for public facilities. Some public facilities, i. e., fire protection, streets and schools, must be provided by the responsible government. Others, such as septic systems, water wells, and private roads, tend to occupy large amounts of open space to provide for single-family homes. In later years, when septic tanks, water wells and substandard streets decline, the cities are usually forced to add the old rural developments to city services, i. e., sewers, water supplies, and streets, at substantially increased cost over the amount

that would have been incurred, if the developments had been originally incorporated into city services.

(k) Moreover, it is not feasible to force housing out of growth centers and into the center cities. The destruction and reconstruction of center city housing raise many problems that have not been solved, except in massive government-sponsored, urban renewal projects—sometimes these have not been successful. Assembly of land ownership for efficient large-scale development is difficult. It is difficult to acquire financing for center-city housing. Construction costs are high, relative to construction costs in growth centers.

(l) From 1960 to 1970, the number of occupied residential units in the San Francisco region increased by 379,000. This increase was in turn made up of 234,000 small households (one and two persons) and 145,000 larger households (three persons and more). The greater rate of increase in smaller than larger households indicates increased demand for housing, with each house, on the average, housing fewer people.

(m) As real income rises, income earners tend to move into better housing. The housing they leave behind "filters down" to persons of lower income.

(n) People in the San Francisco region and elsewhere show a high rate of residential mobility. As of 1970, more than half of the people in the region had lived in their current residence for less than five years. This mobility is a reflection of foreign, interstate and intrastate travel and reflects a demand for housing.

(o) From 1960 to 1970, of a total of 490,782 new housing units constructed, approximately 112,729 units replaced substandard and obsolete housing. This figure represents a replacement of existing housing stock at a rate of approximately one percent per year.

(p) A reasonable forecast of the total increase in the number of households in the San Francisco region for the decade 1970 to 1980 is 274,500. Of these, approximately fifty-four percent will be small and forty-six percent larger households.

(q) A reasonable forecast of the increase in household real income for the period between 1969 and 1979 for San Francisco region families is from a median income of $11,745 in 1969 to a median income of $15,270 in 1979. This shift will result in housing mobility and a "filtration" of vacated housing into the hands of those of lower income, as described in finding no. 14.

(r) A reasonable forecast of the number of housing units needed for replacement of substandard or obsolete housing in the decade 1970 to 1980, at a one percent replacement rate, is 155,280 units.

(s) If the "Petaluma Plan" limiting housing starting at approximately six percent of existing housing stock each year—were to proliferate throughout the San Francisco region, the results would be as explained in the following findings:

(1) For the decade of 1970 to 1980, the "shortfall" in needed housing would be approximately 105,000 units. (For the decade of the 1960's, the shortfall would have been 110,291; and for the decade of the

1950's, 89,376 units.) This shortfall would occur primarily in "growth centers."

(2) Interstate, intrastate and foreign travel would be seriously inhibited, as people trying to move into the region found housing either economically unavailable or simply nonexistent in reasonable quality.

(3) The cost of regional housing would increase. The specific housing most affected would be "threshold housing," that is, the least expensive housing available without government subsidy, but through institutional financing. Loss of "threshold housing", means in turn, that persons of incomes of $8,000 to $14,000 per year would be deprived of housing to meet their needs.

(4) To service demand in the face of restricted supply old, substandard, or obsolete housing would remain in the regional housing market without decrease in price or rent. The aggregate housing stock for the region would decline in quality at a serious rate.

(5) Persons of incomes lower than $8,000 per year who would have been the beneficiaries of "filtration" of housing left by higher-income earners moving into "threshold housing" would find themselves unable to move into better housing.

(6) With fewer available places, the mobility of residents of the region would be inhibited. People tend not to put their own houses on the market until they have located other housing.

(7) The aggregate effect of a proliferation of the "Petaluma Plan" throughout the San Francisco region would be a decline in regional housing stock quality, a loss of the mobility of current and prospective residents and a deterioration in the quality and choice of housing available to income earners with real incomes of $14,000 per year or less.

15. To the extent that any of the foregoing findings constitutes conclusions of law or mixed findings of law and fact, they are incorporated in the conclusions of law that follow.

Conclusions of Law

1. The Supreme Court has made it clear that the freedom to travel, which includes the right to enter and live in any State or municipality in the Union, has long been recognized as a basic right under the Constitution, or a "fundamental right." Memorial Hospital v. Maricopa County, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974); Dunn v. Blumenstein, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); United States v. Guest, 383 U.S. 745, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966); Edwards v. California, 314 U.S. 160, 62 S.Ct. 164, 86 L.Ed. 119 (1941); Kent v. Dulles, 357 U.S. 116, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958); Oregon v. Mitchell, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272 (1969).

2. The "Petaluma Plan" is an effort to avoid the problems that accompany contemporary trends in population growth. Through the plan, the defendants propose to address themselves to such problems by limiting the number of people who will henceforth be permitted to move into the city. The express purpose

and the intended and actual effects of the "Petaluma Plan" have been to exclude substantial numbers of people who would otherwise have elected to immigrate into the city.

The plaintiffs do not challenge the legitimacy of the defendants' desire to deal with the problems of population growth but contend that the means which they have employed to accomplish their ends fall far short of constitutional validity. In essence, the plaintiffs contend that the question of where a person should live is one within the exclusive realm of that individual's prerogative, not within the decision-making power of any governmental unit. Since Petaluma has assumed the power to make such decisions on the individual's behalf, it is contended that the city has violated the people's right to travel. Considering the facts of the case, we agree.

3. It is not necessary for "standing" purposes that the plaintiffs introduce any evidence relating to any individual who was actually excluded by the plan. As stated in Memorial Hospital v. Maricopa County, 415 U.S. 250, at p. 257, 94 S.Ct. 1076, at p. 1082, 39 L.Ed.2d 306 (1974):

> "It is true, as appellees argue, that there is no evidence in the record before us that anyone was actually deterred from traveling by the challenged restriction. But neither did the majority in *Shapiro* find any reason 'to dispute the "evidence that few welfare recipients have in fact, been deterred [from moving] by residence requirements." . . . Indeed, none of the litigants had themselves been deterred.' *Dunn,* supra, 405 U.S., at 340, 92 S.Ct.

> at 1002 (citations omitted). An attempt to distinguish *Shapiro* by urging that a durational residency requirement for voter registration did not deter travel, was found to be a 'fundamental misunderstanding of the law' in *Dunn,* supra, at 339-340, 92 S.Ct. at 1001.
>
> "'*Shapiro* did not rest upon a finding that denial of welfare actually deterred travel. Nor have other "right to travel" cases in this Court always relied on the presence of actual deterrence. In *Shapiro* we explicitly stated that the compelling-state-interest test would be triggered by "any classification which serves to *penalize* the right to [travel] . . . .'" (Emphasis original, footnote omitted.)
>
> "Thus, *Shapiro* and *Dunn* stand for the proposition that a classification which 'operates to *Penalize* those persons . . . who have exercised their constitutional right of interstate migration', must be justified by a compelling state interest."

See also, Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1971) and Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

4. Inasmuch as there is no meaningful distinction between a law which "penalizes" the exercise of a right and one which denies it altogether, it is clear that the growth limitation under attack may be defended only insofar as it furthers a compelling state interest. Memorial Hospital v. Maricopa County, supra. Moreover, as noted in Dunn v. Blumstein, supra, 405 U.S. at 343, 92 S.Ct. at 1003:

"It is not sufficient for the State to show that [the rules implemented] further a very substantial state interest. In pursuing that important interest the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision'. NAACP v. Button, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405 (1963); United States v. Robel, 389 U.S. 258, 265, 88 S.Ct. 419, 424, 19 L.Ed.2d 508 (1967), and must be 'tailored' to serve their legitimate objectives. Shapiro v. Thompson, supra, 394 U.S. at 631, 89 S.Ct. 1322, at 1329. *And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means'.* Shelton v. Tucker, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960)." (Emphasis supplied)

We therefore make the following inquiries into the defendants' asserted "compelling state interests" and the alternatives which are available to them which would accomplish the same goals. (See also, Palo Alto Tenants Union v. Morgan, 321 F.Supp. 908, 911 [N.D. Cal. 1970])

5. Essentially, the defendants claim that there are three such compelling interests which support those exclusionary measures adopted. The first of these relates to the obvious necessity for a municipality to provide for adequate sewage treatment facilities and the related contention that the present capacity of

Petaluma's facilities is inadequate to serve an uncontrolled population. As found above, however, the present facilities of the defendant city are fully capable of meeting the increased demands of a growing population, and therefore, the purported justification is invalid.

Even assuming, *arguendo,* that the defendants' view of the situation is correct, the question still unanswered is whether there be any reasonable alternative available to meet the problem, the implementation of which alternative would not unduly burden the right to travel. Dunn v. Blumstein, supra. One such alternative which suggests itself is the potential for increasing the capacity of the existing sewage treatment plants, a solution both real and practical.

Resting their argument upon the following syllogism, the defendants contend that the new construction is not a "reasonable" alternative. First, they point out that the erection of additional facilities is an expensive proposition. Second, under state law, the necessary funding would have to be approved by the electorate before it could be secured. The ultimate conclusion is that this court must stand ready to order the citizens of Petaluma to vote in a particular manner before those funds could be assured. The assertion that courts do not order the results of elections is so obvious that comment is not required.

The sole issue in this case is whether or not people currently excluded from Petaluma have the right to immigrate into the area. If so, relief will be granted and their rights will be enforced; after which the

matter of dealing with the natural burdens that the exercise of those rights places upon the municipality falls entirely within the discretion of city officials, or the city electorate. Neither Petaluma city officials, nor the local electorate may use their power to disapprove bonds at the polls as a weapon to define or destroy fundamental constitutional rights.

6. The second matter which allegedly "compelled" the defendants to limit population growth relates to the adequacy of the city's water supply. Again, an inquiry into the facts reveals that there is no connection between the availability of water and the exclusionary zoning measures taken. Defendants have purposefully calculated future water needs based upon their own projections which implemented the disputed five hundred unit per year limitation. The city then requested an amount of water which would satisfy the demand of such an artificially limited population.

Where a municipality purposefully limits the quantity of any particular commodity available, then seeks to justify a population limitation based upon an alleged inadequacy of that commodity, it has not stated a compelling interest which supports the limitation. Petaluma has so proceeded in the present case, and accordingly, it has failed to offer a compelling state interest in this regard.

Additionally, "alternative means", including the current ability to request more water supplies from its source, are available to the defendants. For both reasons, therefore, the purported justification set out above must fail.

7. Defendants point out that virtually all zoning schemes limit the manner in which people move about in one way or another. In doing so, they contend, finally and most frankly, that, by virtue of its zoning power, the city has an inherent right to "control its own rate of growth" and that its citizens' desires to protect its "small town character" are sufficiently compelling reasons to justify the exclusionary ordinances. This last defense assertion states the essence of the matter and aptly defines the issue: may a municipality capable of supporting a natural population expansion limit growth simply because it does not prefer to grow at the rate which would be dictated by prevailing market demand. It is our opinion that it may not.

Zoning ordinances have traditionally been entitled to substantial judicial deference, City of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1922); cf. Nectow v. City of Cambridge, 277 U.S. 183, 18 S.Ct. 447, 72 L.Ed. 842 (1928), but they are not totally beyond review. Palo Alto Tenants Union v. Morgan, supra; Boraas v. Village of Belle Terre, 476 F.2d 806 (2nd Cir. 1973), reversed, ... U.S. ....., 94 S.Ct. 1536, 39 L.Ed. 797 (1974)[1]

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[1]Boraas v. Village of Belle Terre has been reversed by the Supreme Court on grounds not relevant to the present case. It was found there that the right to travel was not involved in a zoning regulation which prohibited groups of unmarried persons from living together in the village. In the present case, however, the very reason for being of the "Petaluma Plan" is to keep people out, a patent attempt to affect such excluded persons' right to travel. Accordingly, unlike the *Boraas* decision, the compelling governmental interest standard of review must still be employed in the case at bar, since "fundamental" rights are affected.

The present case is somewhat unique among the federal cases in that it is the only one within our purview which deals with an outright numerical limitation on population. In discussing governmental attempts to control population in another context, the Supreme Court has remarked, in Edwards v. California, supra, 314 U.S. at 173-174, 62 S.Ct. at 167:

> "We have repeatedly and recently affirmed and we now reaffirm, that we do not conceive it our function to pass upon the 'wisdom, need, or appriateness' of the legislative efforts of the States to solve such difficulties . . .
>
> "But this does not mean that there are no boundaries to the permissible area of State legislative activity. There are. And none is more certain than the prohibition against attempts on the part of a single State to isolate itself from the difficulties common to all of them by restraining the transportation of persons and property across its borders. It is frequently the case that a State might gain a momentary respite from the pressure of events to the outside world. But in the words of Mr. Justice Cardozo: 'The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the people of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.' "

Notwithstanding the scarcity of case law on the topic, and in consideration of the general concepts expressed in Edwards v. California, we believe that the reasoning employed in a recent series of cases from

the Commonwealth of Pennsylvania best expresses the underlying rationale of those cases which do recognize the right to travel as fundamental. Accordingly, we concur with those decisions and adopt their reasoning as our own view of the law under the Federal Constitution also.

The first of the series was Bilbar Construction v. Board of Adjustment, 393 Pa. 62, 141 A.2d 851 (1958), in which the Supreme Court stressed its continued agreement with the Euclid[2] standard of constitutionality. The Court upheld a minimum lot size requirement of one acre (plus a 150 foot frontage), noting that the provision could be rationally related to the "general welfare," since even aesthetic considerations come within that realm. Several years later, however, the same Court faced a zoning scheme which, when measured against its own "Euclid" standards, left no doubt in the minds of the court that the zoning scheme violated "the fundamental law" plainly, palpably, etc. In National Land and Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1966), the Court was presented with another acre plot.

The municipality asserted many compelling state interests which resemble those discussed earlier, such as its desire to deal with sewage problems and to avoid heavy traffic loads on its road system. The Supreme

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[2]The Court's language differed slightly from the United States Supreme Court's in Euclid, the Pennsylvania Court electing to provide that the "legislative enactment can be declared void only when it violates the fundamental law clearly, palpably, plainly, and in such a manner as to leave no doubt or hesitation in the minds of the court." 393 Pa. at 70, 141 A.2d at 855.

Court pointed out that under Pennsylvania law municipalities have the right to deal with sewage problems and they should deal with them rather than accept them as they are. With respect to highway traffic the Court made a comment which we consider particularly apropos of the case at bar.

> "It can be seen that the restriction to four acre lots, so far as traffic is concerned, is based upon possible future conditions. Zoning is a tool in the hands of governmental bodies which enables them to more effectively meet the demands of evolving and growing communities. It must not and can not be used by those officials as an instrument by which they may shirk their responsibilities. Zoning is a means by which a governmental body can plan for the future—it may not be used as a means to deny the future. The evidence on the record indicates that for the present and the immediate future the road system of Easttown Township is adequate to handle the traffic load. It is also quite convincing that the roads will become increasingly inadequate as time goes by and that improvements will eventually have to be made. Zoning provisions may not be used, however, to avoid the increased responsibilities and economic burdens which time and natural growth invariably bring." 419 Pa. at 527, 215 A.2d at 609-610.

In addition to the discussion relating to its highways and sewers, the defendant in *National Land* also asserted that its efforts to preserve the "character" of the community were permissible zoning objectives. The character could be preserved, it argued, by the creation of a greenbelt and the aesthetics that large-lot

zoning offers. Implying that simply "zoning" greenbelts into existence raises due process problems, the Court said,

> "[i]f the preservation of open spaces is the township objective, there are means by which this can be accomplished which include authorization for 'cluster zoning' or condemnation of development rights with compensation paid for that which is taken." 419 Pa. at 529, 215 A.2d at 611.

All that remained was the defendant's contention that it was exercising its right to protect the "setting" or the character of the municipality, and that the exercise of that power was valid although it may have the ultimate effect of limiting population growth. As the Court noted, at 419 Pa. 530, 215 A.2d 611

> "Appellants denominate this goal as falling within the ambit of promoting the 'general welfare'. Unfortunately, the concept of the general welfare defies meaningful capsule definition and constitutes an exceedingly difficult standard against which to test the validity of legislation. However, it must always be ascertained at the outset whether, in fact, it is the public welfare which is being benefited or whether, disguised as legislation for the public welfare, a zoning ordinance actually serves purely private interests.
>
> "There is no doubt that many of the residents of this area are highly desirous of keeping it the way it is, preferring, quite naturally, to look out upon the land in its natural state rather than on other homes. These desires, however, do not rise to the level of public welfare. This is purely a matter of private desire which zoning regulations may not be employed to effectuate."

At 419 Pa. 532, 215 A.2d 612, the Court summarized the actual rationale which supported the zoning regulation as representing the township's

> "position that it does not desire to accommodate those who are pressing for admittance to the township unless such admittance will not create any additional burdens upon governmental functions and services. The question posed is whether the township can stand in the way of the natural forces which send out growing population into hitherto undeveloped areas in search of a comfortable place to live. We have concluded not. A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic or otherwise, upon the administration of public services and facilities cannot be held valid. . . .
>
> * * * * * *
>
> "It is clear . . . that the general welfare is not fostered or promoted by a zoning ordinance designed to be exclusive or exclusionary. . . ."

Another minimum lot size requirement[3] was presented in Appeal of Kit-Mar Builders, 439 Pa. 466, 268 A.2d 765 (1970), along with justifications much like the ones raised in *National Land,* supra. The purpose of the regulation, the Court concluded, was the desire to exclude in order to maintain the community at or near its present size. The Court then stated, at 439 Pa. 474, 268 A.2d 768-769, as follows

> "The implication of our decision in National Land is that communities must deal with the problems

[3]In the municipality involved the minimum lot size ranged from two to three acres.

> of population growth. They may not refuse to confront the future by adopting zoning regulations that effectively restrict population to near present levels. It is not for any given township to say who may or may not live within its confines, while disregarding the interests of the entire area. If Concord Township is successful in unnaturally limiting its population growth through the use of exclusive zoning regulations, the people who would normally live there will inevitably have to live in another community, and the requirement that they do so is not a decision that Concord Township should alone be able to make."

Kit-Mar followed an earlier case in which a zoning regulation was held unconstitutional because it "zoned-out" apartment buildings because of their propensity to create traffic problems and other strains on public facilities. In Appeal of Girsh, 437 Pa. 237, 244, 245, 263 A.2d 398, 399, the Court commented as follows

> "Appellee here has simply made a decision that it is content with things as they are, and that the expense or change in character that would result from people moving in to find 'a comfortable place to live' are for someone else to worry about.
>
> * * * * * *
>
> "This case deals with the right of people to *live on land,* a very different problem than whether appellee must allow certain industrial uses within its borders."

As stated above, we find the reasoning of the Pennsylvania Supreme Court persuasive and sound; and accordingly, we take a similar view. A zoning regulation which has as its purpose the exclusion of addi-

tional residents in any degree is not a compelling governmental interest, nor is it one within the public welfare.

8. Since the population limitation policies complained of are not supported by any compelling governmental interest the exclusionary aspects of the "Petaluma Plan" must be, and are hereby declared in violation of the right to travel and, hence, are unconstitutional. Memorial Hospital v. Maricopa County, supra. Such holding is intended to encompass, not only the outright numerical limitations upon the issuance of building permits, but also any and all features of the plan which, directly or indirectly, seek to control population growth by any means other than market demands.

Since we have reached this conclusion, the plaintiffs' contentions regarding the plan's invalidity under the Commerce Clause and remaining Equal Protection arguments need not be considered.

9. The circumstances of the case suggest that in order to assure complete relief to the plaintiffs, the court will retain jurisdiction over the matter until zoning and land use policies of the defendant city are more settled than at the present time.[4] If there be a substantial possibility that the wrong complained of

[4]Affidavits submitted to the court indicate that since the date of the court's oral order directing the defendants to evaluate future building permits without regard to their numerical limitation policies, the defendants have ceased to issue building permits altogether. While the court hesitates to embark upon contempt proceedings on the basis of oral orders, the refusal to act by the defendants leads us to the conclusion expressed above.

may be repeated in a form other than the one declared to be illegal, such continuing jurisdiction is appropriate. See Field Enterprises v. Cove Industries, 297 F. Supp. 989 (E.D. N.Y. 1969). Although plaintiffs contend that the defendants are at this moment embarking upon a "zoning" program which would circumvent the spirit of the present holding, we hestitate to enjoin future activities which may or may not materialize. Cf., *Field Enterprises,* supra; United States v. United States Gypsum Co., 340 U.S. 76, 71 S.Ct. 160, 95 L.Ed. 89 (1950); International Salt Co. v. United States, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20 (1947); United States v. Jefferson County School Board, 372 F.2d 836 (5th Cir. 1966), corrected 380 F.2d 385 (5th Cir. 1967). In the event that the defendants should respond in such a manner, however, the retention of jurisdiction will offer the aggrieved persons immediate access to the court for such action and remedies as may be proper.

10. We believe that it is appropriate against the background of the present case, for the court to comment upon not only what has been held but also what has *not* been held. The issue here has not been whether or not local government may engage in any number of traditional zoning efforts which have been common throughout our history, such as providing for a certain density of population in a given neighborhood, or standards for the type and quality of construction, etc. The only issue presented here, for the first time, is whether or not a municipality may claim the specific right to keep others away. Therefore, the defend-

ants' assertion that the result of this case will destroy or harmfully restrict the zoning and land-use planning power of municipalities is neither pertinent nor correct. No "traditional" powers to zone are affected by the holding in the case.

As contended by plaintiffs on pages 7 and 8 of their Trial Brief,

> "This case is a study in anti-planning, the refusal of a city to come to grips with the fact that it has joined a metropolitan complex and is no longer the sleepy small town that it once was. In a world in which nothing is as unchanging as change, Petaluma wants to stay the same. The means to that end is to draw up the bridge over the moat and turn people away. This is not the use of police power, but the abdication of that power . . . .
>
> "In a large sense this case sets up the constitutional protections against a single small city's passing laws to keep people away, to maintain 'small town character' at the expense of depriving people of mobility, their right to travel, and of decent housing or perhaps any housing at all . . . .
>
> "In a narrower sense, this case [holds] . . . that local police power may [not] be used to shift the burden of providing housing to other cities in a metropolitan region which have their own police power and their own problems. This issue . . . [questions] the jurisdiction of one town to visit its problems on another.
>
> "The prospective resident turned away at Petaluma does not disappear into the hinterland, but presents himself in some other suburb of the same metroplex, perhaps in some town with as many problems or more than Petaluma . . . . By this

> means, Petaluma legislates its problems into problems for Napa, Vallejo or Walnut Creek. May Petaluma pass a law to bind the whole world? See, Bosselman, 'Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World?' 1 Fla.State L.Rev. 234 (1973). . . ."

DECLARATORY JUDGMENT AND PERMANENT INJUNCTION

The court has made its findings of fact and conclusions of law in this action. On those findings and conclusions the court grants its declaratory judgment and permanent injunction as follows:

1. The court decrees that the following resolutions and ordinances of the City of Petaluma, insofar as they purport to limit the natural population growth of the area, violate the United States Constitution for the reasons, and limited to those reasons, set forth in the conclusions of law made by the court in this action:

   (a) The Petaluma Official Development Policy, June 7, 1971, Resolution No. 5760 N.C.S.;

   (b) The Petaluma Environmental Design Plans and Maps, March 27, 1962, Resolution No. 6008 N.C.S.;

   (c) The Resolution of Policy Respecting Residential Policy and Population Growth, April 17, 1972, Resolution No. 6028 N.C.S.

   (d) The Petaluma Residential Development System, August 21, 1972, Resolution No. 6113 N.C.S.

   (e) The Petaluma Housing Element, September 5, 1972, Resolution No. 6126 N.C.S.

(f) All elements of the City of Petaluma general plan, the Petaluma zoning law, the Petaluma subdivision law, or other land use ordinances of the city, that implement the unconstitutional elements contained in subparagraphs (a) through (e) above.

2. The City of Petaluma, Helen Putnam, Robert A. Brunner, John W. Cavanagh, Robert E. Daly, James L. Harberson, Fred V. Mattei, and William A. Perry, and their municipal agents, servants, employees, contractors, attorneys, and each of the successors in interest to all such persons, and all of them, are hereby permanently enjoined from enforcing in any manner the resolutions and ordinances described in paragraph 1(a) through 1(f) above, and the other policies and actions of the city which may have the effect, the intent, directly or indirectly, of placing any numerical limitation, whether definite or approximate, upon the number of persons permitted to enter the City of Petaluma in order to establish residence. Such persons are prohibited from taking any action of any nature, formal or informal, that preserves, duplicates, replaces, reinstates in another form, or otherwise furthers any of the ordinances resolutions, municipal actions, planning, administration of specific land use proposals, or other actions or omissions held by this court to violate the United States Constitution in paragraph one of this declaratory judgment and injunction.

3. The court retains jurisdiction over the subject matter of this action and over all of the parties, in-

cluding those for whom plaintiffs have standing to sue, and their agents, servants, employees, contractors, members of the Petaluma City Council, attorneys, clerks and others serving municipal functions for the City of Petaluma and subject to its orders and control, and all of their successors in interest, to determine on motion on appropriate notice and subject to the court's discretion any further controversies within the subject matter of this litigation, the findings of fact, conclusions of law, this declaratory judgment or the foregoing injunction in this action.

4. In the event that such further controversies shall arise between the parties, it is the intention of the court to appoint a special master whose function it shall be to hear evidence and to make proposed findings of fact and conclusions of law which may thus arise. Such findings and conclusions shall be subject to immediate review by this court.

(a) The parties may, if they so desire, within a period of thirty days from the date of this order, submit to the court a list of no more than three persons whom they believe to be especially qualified to fulfill the position of special master which is described above.

(b) Such special master shall be compensated at a rate set by the court. The sums due for such services, along with other appropriate legal sums, shall be paid by the party who fails to prevail in such actions.

5. The plaintiffs shall have their costs of suit.

Appendix B

United States Court of Appeals
for the Ninth Circuit

Construction Industry Association of Sonoma County, a California non-profit corporation, et al., Plaintiffs-Appellees. vs. The City of Petaluma, a California charter city, Defendants-Appellants.	No. 74-2100 OPINION

[August 13, 1975]

Appeal from the United States District Court
for the Northern District of California

Before: BARNES and CHOY, Circuit Judges,
and EAST,* District Judge.

CHOY, Circuit Judge:

The City of Petaluma (the City) appeals from a district court decision voiding as unconstitutional certain aspects of its five-year housing and zoning plan. We reverse.

Statement of Facts

The City is located in southern Sonoma County, about 40 miles north of San Francisco. In the 1950's and 1960's Petaluma was a relatively self-sufficient

*Honorable William G. East, Senior United States District Judge, District of Oregon, sitting by designation.

town. It experienced a steady population growth from 10,315 in 1950 to 24,870 in 1970. Eventually, the City was drawn into the Bay Area metropolitan housing market as people working in San Francisco and San Rafael became willing to commute longer distances to secure relatively inexpensive housing available there. By November 1972, according to unofficial figures, Petaluma's population was at 30,500, a dramatic increase of almost 25 per cent in little over two years.

The increase in the City's population, not surprisingly, is reflected in the increase in the number of its housing units. From 1964 to 1971. the following number of residential housing units were completed:

1964	270	1968	379
1965	440	1969	358
1966	321	1970	591
1967	234	1971	891

In 1970 and 1971, the years of the most rapid growth, demand for housing in the City was even greater than above indicated. Taking 1970 and 1971 together, builders won approval of a total of 2000 permits although only 1482 were actually completed at the end of 1971.

Alarmed by the accelerated rate of growth in 1970 and 1971, the demand for even more housing, and the sprawl of the City eastward, the City adopted a temporary freeze on development in early 1971. The construction and zoning change moratorium was intended to give the City Council and the City planners an opportunity to study the housing and zoning situation and to develop short and long range plans.

The Council made specific findings with respect to housing patterns and availability in Petaluma, including the following: That from 1960-1970 housing had been in almost unvarying 6000 square-foot lots laid out in regular grid patterns; that there was a density of approximately 4.5 housing units per acre in the single family home areas; that during 1960-1970, 88 per cent of housing permits issued were for single-family detached homes; that in 1970, 83 per cent of Petaluma's housing was single family dwellings; that the bulk of recent development (largely single family homes) occurred on the eastern portion of the City, causing a large deficiency in moderately priced multi-family and apartment units on the east side.

To correct the imbalance between single-family and multi-family dwellings, curb the sprawl of the City on the east, and retard the accelerating growth of the City, the Council in 1972 adopted several resolutions, which collectively are called the "Petaluma Plan" (the Plan).

The Plan, on its face limited to a five-year period (1972-1977),[1] fixes a housing development growth rate

[1]The district court found that although the Plan is ostensibly limited to a five-year period, official attempts have been made to perpetuate the Plan beyond 1977. Such attempts include the urban extension line (*see* text *infra*) and the agreement to purchase from the Sonoma County Water Agency only 9.8 million gallons of water per day through the year 1990. This flow is sufficient to support a population of 55,000. If the City were to grow at a rate of about 500 housing units per year (approximately three persons per unit), the City would reach a population of 55,000 about the year 1990. The 55,000 figure was mentioned by City officials as the projected optimal (and maximum) size of Petaluma. *See, e.g.*, R.T. at 135-43, 145-46.

not to exceed 500 dwelling units per year.[2] Each dwelling unit represents approximately three people. The 500 unit figure is somewhat misleading, however, because it applies only to housing units (hereinafter referred to as "development-units") that are part of projects involving five units or more. Thus, the 500 unit figure does not reflect any housing and population growth due to construction of single family homes or even four-unit apartment buildings not part of any larger project.

The Plan also positions a 200 foot wide "greenbelt" around the City,[3] to serve as a boundary for urban expansion for at least five years, and with respect to the east and north sides of the City, for perhaps ten to fifteen years. One of the most innovative features of the Plan is the Residential Development Control System which provides procedures and criteria for the award of the annual 500 development-unit permits. At the heart of the allocation procedure is an intricate point system, whereby a builder accumulates points for conformity by his projects with the City's general plan and environmental design plans, for good architectural design, and for providing low and moderate income dwelling units and various recreational facilities. The Plan further directs that allocations of building permits

[2]The allotment for each year is not an inflexible limitation. The Plan does provide for a 10 percent variance (50 units) below or above the 500 unit annual figure, but the expectation of the Council is that not more than 2500 units will be constructed during the five-year period.

[3]At some points this urban extension line is about .25 mile beyond the present City limits.

are to be divided as evenly as feasible between the west and east sections of the City and between single-family dwellings and multiple residential units (including rental units),[4] that the sections of the City closest to the center are to be developed first in order to cause "infilling" of vacant area, and that 8 to 12 per cent of the housing units approved be for low and moderate income persons.

In a provision of the Plan, intended to maintain the close-in rural space outside and surrounding Petaluma, the City solicited Sonoma County to establish stringent subdivision and appropriate acreage parcel controls for the areas outside the urban extension line of the City and to limit severly further residential infiling.

Purpose of the Plan

The purpose of the Plan is much disputed in this case. According to general statements in the Plan itself, the Plan was devised to ensure that "development in the next five years, will take place in a reasonable, orderly, attractive manner, rather than in a completely haphazard and unattractive manner." The controversial 500 unit limitation on residential development-units was adopted by the City "[i]n order to protect its small town character and surrounding

[4]By providing for the increase of multi-family dwellings (including townhouses as well as rental apartments), the Plan allows increased density. Whereas, during the years just preceding the Plan, housing density was about 4.5 units per acre, under the Plan single-family housing will consist of not only low (4.5 units per acre) but also medium density (4.5 to 10 units per acre). And multi-family housing, to comprise about half of the housing under the Plan, will be built at a density of 10 or more units per acre.

open space."[5] The other features of the Plan were designed to encourage an east-west balance in development, to provide for variety in densities and building types and wide ranges in prices and rents, to ensure infilling of close-in vacant areas, and to prevent the sprawl of the City to the east and north. The Builders Association of Sonoma County (the Association) argues and the district court found, however, that the Plan was primarily enacted "to limit Petaluma's demographic and market growth in housing and in the immigration of new residents." 375 F.Supp. 574, 576.

Market Demand and Effect of the Plan

In 1970 and 1971, housing permits were allotted at the rate of 1000 annually, and there was no indication that without some governmental control on growth consumer demand would subside or even remain at the 1000 unit per year level. Thus, if Petaluma had imposed a flat 500-unit limitation on *all* residential housing the effect of the Plan would clearly be to retard to a substantial degree the natural growth rate of the City. Petaluma, however, did not apply the 500-unit limitation across the board, but instead exempted all projects of four units or less. Because appellees failed to introduce any evidence whatsoever as to the number of exempt units

[5]After the appellees initiated this suit, the City attempted to show that the Plan was implemented to prevent the over-taxing of available water and sewage facilities. We find it unnecessary, however, to consider the claim that sewage and water problems justified implementation of the Plan.

expected to be built during the five-year period, the effect of the 500 *development-unit* limitation on the natural growth in housing is uncertain. For purposes of this decision, however, we will assume that the 500 development-unit growth rate is in fact below the reasonably anticipated market demand for such units and that absent the Petaluma Plan, the City would grow at a faster rate.

According to undisputed expert testimony at trial, if the Plan (limiting housing starts to approximately 6 per cent of existing housing stock each year) were to be adopted by municipalities throughout the region, the impact on the housing market would be substantial. For the decade 1970 to 1980, the shortfall in needed housing in the region would be about 105,000 units (or 25 per cent of the units needed). Further, the aggregate effect of a proliferation of the Plan throughout the San Francisco region would be a decline in regional housing stock quality, a loss of the mobility of current and prospective residents and a deterioration in the quality and choice of housing available to income earners with real incomes of $14,000 per year or less. If, however, the Plan were considered by itself and with respect to Petaluma only, there is no evidence to suggest that there would be a deterioration in the quality and choice of housing available there to persons in the lower and middle income brackets. Actually, the Plan increases the availability of multi-family units (owner-occupied and rental units) and low-income units which were rarely constructed in the pre-Plan days.

Court Proceedings

Two landowners (the Landowners) and the Association instituted this suit under 28 U.S.C. §§ 1331, 1343 and 42 U.S.C. § 1983 against the City and its officers and council members, claiming that the Petaluma Plan was unconstitutional. The district court ruled that certain aspects of the Plan unconstitutionally denied the right to travel in so far as they tended "to limit the natural population of the area." 375 F.Supp. 574, 588. The court enjoined the City and its agents from implementing the unconstitutional elements of the Plan, but the order was stayed by Justice Douglas pending this appeal.

Jurisdiction

The City, on two wholly separate grounds, challenges the power of the district court to hear the suit below. The City contends that a court has no jurisdiction under 28 U.S.C. § 1343 and 42 U.S.C. § 1983 to entertain a suit against members of a city council. Relying on *City of Kenosha v. Bruno,* 412 U.S. 507 (1973), which held that a city is not a "person" under § 1983, the City argues that its councilmen, similarly, are not "persons." This court, however, has recently faced the very issue raised by the City and has held that a city official is a "person" within the meaning of § 1983 and that a district court has jurisdiction under 28 U.S.C. § 1343 over an action to enjoin him from enforcing an unconstitutional statute. *Ybarra v. City of the Town of Los Altos Hills,* 503 F.2d 250, 253 (9th Cir. 1974).

The district court had jurisdiction not only under § 1343 but also under the general federal question statute, 28 U.S.C. 1331. It does not appear to a legal certainty that the amount in controversy is less than $10,000. *See St. Paul Mercury Indemnity Co. v. Red Cab Co.,* 303 U.S. 283, 288-89 (1938).

Standing

The City also challenges the standing of the Association and the Landowners to maintain the suit. The standing requirement raises the threshhold question in every federal case whether plaintiff has made out a "case or controversy" between himself and the defendant within the meaning of Article III of the Constitution. In order to satisfy the constitutional requirement that courts decide only cases or controversies and to ensure the requisite concreteness of facts and adverseness of parties, plaintiff must show that he has a "personal stake in the outcome of the controversy," *Baker v. Carr,* 369 U.S. 186, 204 (1962), or that he has suffered "some threatened or actual injury resulting from the putatively illegal action." *Linda R.S. v. Richard D.,* 410 U.S. 614, 617 (1973). Further, the plaintiff must satisfy the additional court-imposed standing requirement that the "interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 153 (1970). A corollary to the "zone of interest" requirement is the well-recognized general rule that "even when the plaintiff

has alleged injury sufficient to meet the 'case or controversy' requirement, . . . the plaintiff must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin,* ..... U.S. ....., ..., slip op. at 8 (1975); *accord, United States v. Raines,* 362 U.S. 17, 21 (1960); *Barrows v. Jackson,* 346 U.S. 249, 256 (1953).

Appellees easily satisfy the "injury in fact" standing requirement. The Association alleges it has suffered in its own right monetary damages due to lost revenues. Sonoma County builders contribute dues to the Association in a sum proportionate to the amount of business the builders do in the area. Thus, in a very real sense a restriction on building in Petaluma causes economic injury to the Association.[6]

The two Landowners also have already suffered or are threatened with a direct injury. It is their position that the Petaluma Plan operated, of itself, to adversely affect the value and marketabilty of their land for residential uses, and such an allegation is sufficient to show that they have a personal stake in the outcome of the controversy. *See Golden v. Planning Board of Town of Ramapo,* 30 N.Y. 2d 359, 365-66, 285 N.E. 2d 291, 294, 334 N.Y.S. 2d 138, 142, *appeal dismissed,* 409 U.S. 1003 (1972).

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[6]Even assuming *arguendo* that the Association itself has not suffered a direct injury, it nonetheless has standing to represent the interests of its own members, most if not all of whom have suffered or are threatened with a direct injury. *See* Warth v. Seldin, ... U.S. at ....., slip op. at 20; Sierra Club v. Morton, 405 U.S. 727, 734-41 (1972).

Although appellees have suffered or are threatened with direct personal injury, the "zone of interest" requirement poses a huge stumbling block to their attempt to show standing. The primary federal claim upon which this suit is based—the right to travel or migrate—is a claim asserted not on the appellees' own behalf, but on behalf of a group of unknown third parties allegedly excluded from living in Petaluma. Although individual builders, the Association, and the Landowners are admittedly adversely affected by the Petaluma Plan, their economic interests are undisputedly outside the zone of interest to be protected by any purported constitutional right to travel. Accordingly, appellees' right to travel claim "falls squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *Warth v. Seldin,* U.S. at ....., slip op. at 18.

There are several exceptions to this general rule, but plaintiffs do not fall within any of them. Congress may grant standing by statute to persons who might otherwise lack standing, *id.*, but here no statute expressly or by clear implication grants to persons in appellees' position a right of action based on third parties' right to travel. On several occasions, the Supreme Court has granted standing to persons whom a criminal statute directly affected to challenge the statute on the ground that if enforced it would infringe the rights of third parties. *E.g., Doe v. Bolton,* 410 U.S. 179, 188-89 (1973); *Griswold v. Connecticut,* 381 U.S. 479, 481 (1965). No comparison,

however, may be fairly drawn between appellees and the doctors facing criminal sanctions in *Bolton* and *Griswold.* Nor do appellees allege that the Petaluma Plan precludes or otherwise adversely affects a relationship existing between them and the persons whose rights allegedly have been violated. *Cf. NAACP v. Alabama,* 357 U.S. 449, 458-60 (1958). The only connection between any of the appellees and any of the persons who purportedly are excluded from Petaluma is the possibility that but for the Plan they would be parties to a purchase-sale agreement.[7] There exists no special, on-going relationship between appellees and those whose rights allegedly are violated which militates in favor of granting standing. *Cf. NAACP v. Alabama, supra,* at 458-60; *Pierce v. Society of Sisters,* 268 U.S. , 534-36 (1925); *Washington Utilities & Transportation Commission v. FCC,* ..... F.2d ....., ... (9th Cir. 1975); *Akron Board of Education v. State Board of Education of Ohio,* 490 F.2d 1285, 1289-90 (6th Cir.), *cert. denied,* 417 U.S. 932 (1974). Nor have the Association and the Landowners shown that their prosecution of the suit is necessary to ensure protection of the rights asserted. *Cf. Sullivan v. Little Hunting Park,* 396 U.S. 229, 237 (1969); *NAACP v. Alabama,* 357 U.S. at 459; *Barrows v. Jackson,* 346 U.S. at 257. Assuming *arguendo* that the constitutional right to travel applies to this case,

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[7]The Association does not allege that a contractual or other relationship protected under 42 U.S.C. § 1981 and § 1982 actually exists between its members and any particular person excluded from residence in the town, or that any such relationship was either punished or disrupted by the City. *Compare* Sullivan v. Little Hunting Park, 396 U.S. 229, 237 (1969) *with* Warth v. Seldin, ... U.S. at ..... n.22, slip op. at 23 n.22.

those individuals whose mobility is impaired may bring suit on their own behalf and on behalf of those similarly situated. Although *Warth v. Seldin* denied standing to a group of low-income and minority-group plaintiffs challenging exclusionary zoning practices, the case is no bar to a suit against the City brought by a proper group of plaintiffs. The Court in *Warth v. Seldin* left open the federal court doors for plaintiffs who have some interest in a particular housing project and who, but for the restrictive zoning ordinances, would be able to reside in the community.

Although we conclude that appellees lack standing to assert the rights of third parties, they nonetheless have standing to maintain claims based on violations of rights personal to them. Accordingly, appellees have standing to challenge the Petaluma Plan on the grounds asserted in their complaint that the Plan is arbitrary and thus violative of their due process rights guaranteed by the Fourteenth Amendment and that the Plan poses an unreasonable burden on interstate commerce. *See Steel Hill Development, Inc. v. Town of Sanbornton,* 469 F.2d 956, 959 (1st Cir. 1972); *Sisters of Providence of St. Mary of the Woods v. City of Evanston,* 335 F. Supp. 396, 400 (N.D. Ill. 1971). The fact that one of the Landowner's property lies wholly outside the present City boundaries and that the other's property lies mostly outside the boundaries is no bar to their challenging the City's Plan which has a direct, intended and immediate effect on the property. *See Scott v. City of*

Indian Wells, 6 Cal. 3d 541, 548-49, 492 P.2d 1137, 1141-42, 99 Cal. Rptr. 745, 749-50 (1972).

Other Challenges to the Plan

Although the district court rested its decision solely on the right to travel claim,[8] all the facts and legal conclusions necessary to resolve appellees' other claims are part of the record. Thus, in order to promote judicial economy, we now dispose of the other challenges to the Plan.[9] *See Blaney v. Florida National Bank at Orlando,* 357 F.2d 27, 28 (5th Cir. 1966); *Necchi v. Necchi Sewing Machine Sales Corp.,* 348 F.2d 693, 697 (2d Cir. 1965), *cert. denied,* 383 U.S. 909 (1966).

Substantive Due Process

Appellees claim that the Plan is arbitrary and unreasonable and, thus, violative of the due process clause of the Fourteenth Amendment. According to

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[8]Since the court struck down the Plan on the right to travel ground, the court believed it unnecessary to consider plaintiffs' contentions that the Plan was invalid under the commerce clause and under the equal protection clause of the Fourteenth Amendment. 375 F. Supp. at 586.

[9]In discussing whether the Plan, although a burden on the right to travel, was justified by a compelling state interest, the court scrutinized the Plan's purpose. According to the court, the preservation of the City's small town character and the slowing down of the rate of growth by limiting the number of new homeowners were not within the public welfare. 375 F. Supp. at 586. Thus, in light of this finding, it would be a wasteful exercise to remand the case for consideration of the substantive due process issue. The court has already made clear its conclusion that the avowed purposes of the plan do not amount to legitimate governmental interests.

appellees, the Plan is nothing more than an exclusionary zoning device,[10] designed solely to insulate Petaluma from the urban complex in which it finds itself. The Association and the Landowners reject, as falling outside the scope of any legtimate governmental interest, the City's avowed purposes in implementing the Plan—the preservation of Petaluma's small town character and the avoidance of the social and evironmental problems caused by an uncontrolled growth rate.

In attacking the validity of the Plan, appellees rely heavily on the district court's finding that the express purpose and the actual effect of the Plan is to exclude substantial numbers of people who would otherwise elect to move to the City. 375 F. Supp. at 581. The existence of an exclusionary purpose and effect reflects, however, only *one* side of the zoning

[10]"Exclusionary zoning" is a phrase popularly used to describe suburban zoning regulations which have the effect, if not also the purpose, of preventing the migration of low and middle-income persons. Since a large percentage of racial minorities fall within the low and middle income brackets, exclusionary zoning regulations may also effectively wall out racial minorities. *See generally* Aloi, Goldberg & White, *Racial and Economic Segregation by Zoning: Death Knell for Home Rule?* 1969 U. Tol. L. Rev. 65 (1969); Bigham & Bostick, *Exclusionary Zoning Practices: An Examination of the Current Controversy*, 25 Vand. L. Rev. 1111 (1972); Davidoff & Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 Syracuse L. Rev. 509 (1971); Note, *Exclusionary Zoning and Equal Protection*, 84 Harv. L. Rev. 1645 (1971).

Most court challenges to and comment upon so-called exclusionary zoning focus on such traditional zoning devices as height limitations, minimum square footage and minimum lot size requirements, and the prohibition of multi-family dwellings or mobile homes. The Petaluma Plan is unique in that although it assertedly slows the growth rate it replaces the past pattern of single-family detached homes with an assortment of housing units, varying in price and design.

regulation. Practically all zoning restrictions have as a purpose and effect the *exclusion* of some activity or type of structure or a certain density of inhabitants. And in reviewing the reasonableness of a zoning ordinance, our inquiry does not terminate with a finding that it is for an exclusionary purpose.[11] We must determine further whether the *exclusion* bears any rational relationship to a *legitimate state interest*. If it does not, then the zoning regulation is invalid. If, on the other hand, a legitimate state interest is furthered by the zoning regulation, we must defer to the legislative act. Being neither a super legislature nor a zoning board of appeal, a federal court is without authority to weigh and reappraise the factors considered or ignored by the legislative body in passing the challenged zoning regulation.[12] The reasonableness, not the wisdom, of the Petaluma Plan is at issue in this suit.

It is well settled that zoning regulations "must find their justification in some aspect of the police power, asserted for the public welfare." *Village of Euclid v.*

[11]Our inquiry here is not unlike that involved in a case alleging denial of equal protection of the laws. The mere showing of some discrimination by the state is not sufficient to prove an invasion of one's constitutional rights. Most legislation to some extent discriminates between various classes of persons, business enterprises, or other entities. However, absent a suspect classification or invasion of fundamental rights, equal protection rights are violated only where the classification does not bear a rational relationship to a legitimate state interest. *See* Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250, 254 (9th Cir. 1974).

[12]Appellees' brief is unnecessarily oversize (125 pages) mainly because it is rife with quotations from writers on regional planning, economic regulation and sociological policies and themes. These types of considerations are more appropriate for legislative bodies than for courts.

Ambler Realty Co., 272 U.S. 365, 387 (1926). The concept of the public welfare, however, is not limited to the regulation of noxious activities or dangerous structures. As the Court stated in *Berman v. Parker,* 348 U.S. 26, 33 (1954):

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

(citations omitted). *Accord, Village of Belle Terre v. Boraas,* 416 U.S. 1, 6, 9 (1974).

In determining whether the City's interest in preserving its small town character and in avoiding uncontrolled and rapid growth falls within the broad concept of "public welfare", we are considerably assisted by two recent cases. *Belle Terre, supra,* and *Ybarra v. City of Town of Los Altos Hills,* 503 F.2d 250 (9th Cir. 1974), each of which upheld as not unreasonable a zoning regulation much more restrictive than the Petaluma Plan, are dispositive of the due process issue in this case.

In *Belle Terre* the Supreme Court rejected numerous challenges[13] to a village's restricting land use to

[13]The plaintiffs in *Belle Terre* claimed *inter alia* that the ordinance interferred with a person's right to travel and right to migrate to and settle within a state.

The Supreme Court held that since the ordinance was not aimed at transients, there was no infringement of anyone's right to travel. 416 U.S. at 7. Although due to appellees' lack of standing we do not reach today the right to travel issue, we note that the Petaluma Plan is not aimed at transients, nor does it penalize those who have recently exercised their right to travel. *See* CEEED v. California Coastal Zone Conservation Comm'n, 43 Cal. App. 3d 306, 118 Cal. Rptr. 315, 332-34 (1974); *cf.* Dunn v. Blumstein, 405 U.S. 330, 342 (1972).

one-family[14] dwellings excluding lodging houses, boarding houses, fraternity houses or multiple-dwelling houses. By absolutely prohibiting the construction of or conversion of a building to other than single-family dwelling, the village ensured that it would never grow, if at all, much larger than its population of 700 living in 220 residences. Nonetheless, the Court found that the prohibition of boarding houses and other multi-family dwellings was reasonable and within the public welfare because such dwellings present urban problems, such as the occupation of a given space by more people, the increase in traffic and parked cars and the noise that comes with increased crowds. According to the Court,

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker, supra.* The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

416 U.S. at 9. While dissenting from the majority opinion in *Belle Terre* on the ground that the regula-

[14]The word "family" as used in the ordinance meant one or more persons related by blood, adoption or marriage, living together as a single housekeeping unit. Two or fewer persons living together, though not related by blood, adoption or marriage were considered a "family". 416 U.S. at 2.

tion unreasonably burdened the exercise of First Amendment associational rights, Mr. Justice Marshall concurred in the Court's express holding that a local entity's zoning power is extremely broad:

> [L]ocal zoning authorities may properly act in furtherance of the objectives asserted to be served by the ordinance at issue here: *restricting uncontrolled growth,* solving traffic problems, keeping rental costs at a reasonable level, and making the community attractive to families. The police power which provides the justification for zoning is not narrowly confined. And, it is appropriate that we afford zoning authorities *considerable latitude in choosing the means by which to implement such purposes.*

416 U.S. at 13-14 (Marshall, J., dissenting) (emphasis added) (citations omitted).

Following the *Belle Terre* decision, this court in *Los Altos Hills* had an opportunity to review a zoning ordinance providing that a housing lot shall contain not less than one acre and that no lot shall be occupied by more than one primary dwelling unit. The ordinance as a practical matter prevented poor people from living in Los Altos Hills and restricted the density, and thus the population, of the town. This court, nonetheless, found that the ordinance was rationally related to a legitimate governmental interest —*the preservation of the town's rural environment*— and, thus, did not violate the equal protection clause of the Fourteenth Amendment. 503 F.2d at 254.

Both the Belle Terre ordinance and the Los Altos Hills regulation had the purpose and effect of permanently restricting growth; nonetheless, the court in each case upheld the particular law before it on the ground that the regulation served a legitimate governmental interest falling within the concept of the public welfare: the preservation of quiet family neighborhoods (Belle Terre) and the preservation of a rural environment (Los Altos Hills). Even less restrictive or exclusionary than the above zoning ordinances is the Petaluma Plan which, unlike those ordinances, does not freeze the population at present or near-present levels.[15] Further, unlike the Los Altos Hills ordinance and the various zoning regulations struck down by state courts in recent years, the Petaluma Plan does not have the undesirable effect of walling out any particular income class nor any racial minority group.[16]

[15]Under the Petaluma Plan, the population is expected to increase at the rate of about 1500 persons annually. This rate approximates the rate of growth in the 1960's and represents about a 6 percent increase per year over the present population.

[16]Although appellees have attempted to align their business interests in attacking the Plan with legitimate housing needs of the urban poor and racial minorities, the Association has not alleged nor can it allege, based on the record in this case, that the Plan has the purpose and effect of excluding poor persons and racial minorities. *Cf.* Board of County Supervisors of Fairfax County v. Carper, 200 Va. 653, 107 S.E. 2d 390 (1959). Contrary to the picture painted by appellees, the Petaluma Plan is "inclusionary" to the extent that it offers new opportunities, previously unavailable, to minorities and low and moderate-income persons. Under the pre-Plan system single family, middle-income housing dominated the Petaluma market, and as a result low and moderate income persons were unable to secure housing in the area. The Plan radically changes the previous building pattern and requires that housing permits be evenly divided between single family and multi-family units and that approximately eight to twelve per cent of the units be constructed specifically for low and moderate income persons.

In stark contrast, each of the exclusionary zoning regulations invalidated by state courts in recent years impeded the ability of

Although we assume that some persons desirous of living in Petaluma will be excluded under the housing permit limitation and that, thus, the Plan may frustrate some legitimate regional housing needs, the Plan is not arbitrary or unreasonable. We agree with appellees that unlike the situation in the past most municipalities today are neither isolated nor wholly independent from neighboring municipalities and that, consequently, unilateral land use decisions by one local entity affect the needs and resources of an entire region. *See, e.g., Golden v. Planning Board of Town of Ramapo,* 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed,* 409 U.S. 1003 (1972); *National Land & Investment Co. v. Kohn,* 419 Pa. 504, 215 A.2d 597 (1965); Note, *Phased Zoning: Regulation of the Tempo and Sequence of Land Development,* 26 Stan. L. Rev. 585, 605 (1974). It does not necessarily follow, however, that the *due process* rights of builders and landowners are violated merely because a local entity exercises in its own self-interest the police power lawfully delegated to it by the

low and moderate income persons to purchase or rent housing in the locality. *See, e.g.,* Southern Burlington County NAACP v. Township of Mount Laurel, ___ N.J. ___, ___ A.2d ___ (Mar. 24, 1975) (zoned exclusively for single family, detached dwellings and multi-family dwellings designed for middle and upper income persons); Oakwood at Madison, Inc. v. Township of Madison, 117 N.J. Super. 11, 283 A.2d 353 (1971) (minimum one or two acre requirement and severe limitation on multi-family units); Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970) (two to three acre minimum lot size); Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970) (prohibition of apartment buildings); National Land & Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965) (4 acre minimum lot); Board of County Supervisors of Fairfax County v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959) (rezoning to minimum two acre lots with the effect of keeping poor in another section of municipality).

state. *See Belle Terre, supra; Los Altos Hills, supra.* If the present system of delegated zoning power does not effectively serve the state interest in furthering the general welfare of the region or entire state, it is the state legislature's and not the federal courts' role to intervene and adjust the system. As stated *supra,* the federal court is not a super zoning board and should not be called on to mark the point at which legitimate local interests in promoting the welfare of the community are outweighed by legitimate regional interests. *See Note, supra,* at 608-11.

We conclude therefore that under *Belle Terre* and *Los Altos Hills* the concept of the public welfare is sufficiently broad to uphold Petaluma's desire to preserve its small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace.[17]

[17]Our decision upholding the Plan as not in violation of the appellees' due process rights should not be read as a permanent endorsement of the Plan. In a few years the City itself for good reason may abandon the Plan or the state may decide to alter its laws delegating its zoning power to the local authorities; or to meet legitimate regional needs, regional zoning authorities may be established. *See, e.g.,* Cal. Gov. Code §§ 66600 *et seq.* (San Francisco Bay Conservation and Development Commission); Cal Gov. Code §§ 66801, 67000 *et seq.* (Tahoe Regional Planning Agency); Public Resources Code §§ 27000 *et seq.* (California Coastal Zone Conservation Commission). To be sure, housing needs in metropolitan areas like the San Francisco Bay Area are pressing and the needs are not being met by present methods of supplying housing. However, the federal court is not the proper forum for resolving these problems. The controversy stirred up by the present litigation, as indicated by the number and variety of *amici* on each side, and the complex economic, political and social factors involved in this case are compelling evidence that resolution of the important housing and environmental issues raised here is exclusively the domain of the legislature.

Commerce Clause

The district court found that housing in Petaluma and the surrounding areas is produced substantially through goods and services in interstate commerce and that curtailment of residential growth in Petaluma will cause serious dislocation to commerce. 375 F. Supp. at 577, 579. Our ruling today, however, that the Petaluma Plan represents a reasonable and legitimate exercise of the police power obviates the necessity of remanding the case for consideration of appellees' claim that the Plan unreasonably burdens interstate commerce.

It is well settled that a state regulation validly based on the police power does not impermissibly burden interstate commerce where the regulation neither discriminates against interstate commerce nor operates to disrupt its required uniformity. *Huron Cement Co. v. Detroit,* 362 U.S. 441, 448 (1960). As stated by the Supreme Court almost 25 years ago:

> When there is a reasonable basis for legislation to protect the social, as distinguished from the economic, welfare of a community, it is not for this Court because of the Commerce Clause to deny the exercise locally of the sovereign power of the [state].

Breard v. Alexandria, 341 U.S. 622, 641 (1951). It is wholly beyond a court's limited authority under the Commerce Clause to review state legislation by balancing reasonable social welfare legislation against its incidental burden on commerce. *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock*

Island & Pacific Railroad Co., 393 U.S. 129, 136 (1968).

Consequently, since the local regulation here is rationally related to the social and environmental welfare of the community and does not discriminate against interstate commerce or operate to disrupt its required uniformity, appellees' claim that the Plan unreasonably burdens commerce must fail.[18]

Reversed.

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[18]Our decision today conforms with others which have upheld reasonable state environmental legislation despite some burden incidentally placed on interstate commerce. *See, e.g.,* Huron Cement Co. v. Detroit, *supra* (air pollution statute); Procter & Gamble Co. v. City of Chicago, 509 F.2d 69 (7th Cir.), *cert. denied,* ___ U.S. ___ (1975) (ban on phosphate detergents); American Can Co. v. Oregon Liquor Control Commission, 15 Or. App. 618, 517 P.2d 691 (1973) (ban on non-returnable beverage containers).

Appendix C

United States Court of Appeals
For the Ninth Circuit

No. 74-2100

Construction Industry Association of Sonoma County, a nonprofit corporation, et al.,
Plaintiffs-Appellees,

vs.

The City of Petaluma, a California charter city,
Defendants-Appellants.

[Filed Oct. 2, 1975]

Appeal from the United States District Court
for the Northern District of California

ORDER

Before: BARNES and CHOW, Circuit Judges, and EAST,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has voted to grant rehearing en banc. F.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

*Hon. William G. East, Senior United States District Judge, District of Oregon, sitting by designation.

Appendix D

United States District Court
For the Northern District of California

Case No. C-73-663-LHB

Construction Industry Association of Sonoma County, a nonprofit corporation, et al.,
Plaintiff,

vs.

The City of Petaluma, a California charter city,
Defendant.

NOTICE OF SPREADING OF MANDATE

To:

Arata, Misuraca, Clement & Haley
717 College Avenue
Santa Rosa, CA 95402

Joseph H. Henderson
1200 College Avenue
Santa Rosa, CA 95402

Edouard E. Robert
133½ Kentucky Street
Petaluma, CA 94952

Sturgis, Den-Dulk Douglas & Anderson
1322 Webster Street
Oakland, CA 94612

Notice is hereby given that the Mandate of the U.S. Court of Appeals for the Ninth Circuit to this Court was spread on the minutes of this Court on October 14, 1975.

( ) Affirming

(X) Reversing

( ) Reversing and Remanding (with instructions)

Dated: October 15, 1975.

Clerk of Court
/s/ Theodore H. Kast
by: Theodore H. Kast
Deputy Clerk.

Appendix E

United States Court of Appeals
For the Ninth Circuit

No. 74-2100 DC# C 73-663-LHB

Construction Industry Association of Sonoma County, a nonprofit corporation, et al.,
Plaintiffs,
vs.
The City of Petaluma, a California charter city,
Defendants.

[Filed Oct. 14, 1975]

Appeal from the United States District Court
for the Northern District of California

JUDGMENT

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is REVERSED.

With costs in this Court in favor of the Appellant and against Appellee in the amount of $1,325.44.

Printing Appellant's briefs	$1,260.44
Docket fee	50.00
Clerk's fee	1500
	$1,325.44

Filed and entered August 13, 1975.

A True Copy

Attest Oct. 9, 1975

Emil E. Melfi, Jr.,
Clerk

J. N. Iway,
Deputy.

Appendix F

CONSTITUTIONAL PROVISIONS

ARTICLE I

SECTION 8. The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

ARTICLE III

SECTION 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different states,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. . . .

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XIV

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U. S.
FILED
JAN 27 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1975

No. 75-923

CONSTRUCTION INDUSTRY ASSOCIATION OF SONOMA COUNTY, a California non-profit corporation, THE SAN FRANCISCO, PENINSULA AND REDWOOD EMPIRE BUILDING INDUSTRY ASSOCIATION, a California non-profit corporation, PETALUMA PARTNERS, a California limited partnership, and WILLIAM LAWRENCE,
Petitioners,

vs.

THE CITY OF PETALUMA, a California Charter City, HELEN PUTNAM, ROBERT A. BRUNNER, JOHN W. CAVANAGH, ROBERT E. DALY, JAMES L. HARBERSON, FRED V. MATTEI, and WILLIAM A. PERRY,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court
OF THE
United States

October Term, 1975

No. 75-923

Construction Industry Association of Sonoma County, a California non-profit corporation, The San Francisco, Peninsula and Redwood Empire Building Industry Association, a California non-profit corporation, Petaluma Partners, a California limited partnership, and William Lawrence,
Petitioners,

vs.

The City of Petaluma, a California Charter City, Helen Putnam, Robert A. Brunner, John W. Cavanagh, Robert E. Daly, James L. Harberson, Fred V. Mattei, and William A. Perry,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

STATEMENT OF THE CASE

This case involves the validity of land use regulations of the City of Petaluma, California. These land use regulations, which were adopted by the City Council in 1971 and 1972, have been collectively referred to throughout

this litigation as the Petaluma Plan or the Plan and will be so referred to herein. Some of the purposes and policies of the Plan are stated in the portions of the Plan which are set forth in the Appendix to this Brief.

In early 1971, the City of Petaluma adopted a temporary freeze on development. The freeze was designed to give the City an opportunity to evaluate development trends, ascertain the needs and desires of its citizens, and develop a coordinated response to a broad range of pressing municipal concerns, including the inadequacy of public facilities (principally water supply and sewage treatment facilities) to serve a rapidly increasing population, the adverse environmental impact of urban sprawl and of expanded residential construction, the imbalance between single-family and multi-family residential units, the concentration of growth in the form of grid-type subdivisions in the eastern section of the City, and adverse effect of these trends upon the City's tax base.

Shortly after the imposition of the freeze, the City established a special Development Policy Advisory Committee. With the aid of a firm of independent planning consultants, this Committee prepared a Development Policy which was reviewed and recommended favorably by the city planning commission. The city council adopted the Development Policy in June, 1971. (Plaintiffs' Exhibit No. 1-5, Pages 29-36)

After extensive public hearings and full expression of views by all segments of the community, including property owners and developers, the City Council adopted Environmental Design Plans in March, 1972 (Plaintiffs' Exhibit No. 1-5, Page 37), stated the City's Policy with

Respect to Residential Construction and Population Growth in April, 1972 (Plaintiffs' Exhibit No. 1-5, Pages 38-40), adopted the Residential Development Control System in August, 1972 (Plaintiffs' Exhibit No. 1-7), and adopted the Housing Element of the General Plan in September, 1972. (Plaintiffs' Exhibit No. 1-8)

These five elements, collectively referred to as the Plan, constitute an interim land use regulation in effect for a period of five years ending in 1977. The Plan provides for orderly, manageable and reasonable growth both within and without the City during its five year duration. The Plan as adopted and in effect is the sole matter before the court, not some other or different regulation or plan about which there may be speculation. It is a growth plan, not a no-growth plan.

The Plan provides that residential development which is subject to the Plan shall be limited to about 500 residential units per year, or a total of 2,500 for the five year period. *Residential developments of four dwelling units or less are excepted from the Plan, and do not count against the stated numerical limit.* Development in Petaluma at the rate of 500 dwelling units per year represents a growth rate of approximately six percent (6%) each year, even without taking into account the developments of four units or less; the growth rate in the entire San Francisco Bay area, in contrast, is approximately one and one-half percent (1½%) per year.

The Plan provides a system of allocation of the permitted number of dwelling units among applicants engaged in the business of residential development. An allocation board makes a preliminary determination upon the basis

of several criteria enumerated in the Plan, and the final allocation determination is made by the City Council. The allocation procedure is spelled out in detail and includes provisions for hearings and appeals.

Allocations are divided between sections of the City and between single-family dwellings and multiple residential units. Specific provision is made for low and moderate income housing: the Council may require that 8-12% of the dwelling units each year shall be in this category, and low and moderate income housing is established as one of the criteria for which allocation points are given. If all of the allocations for one year are not made, there are provisions for carryover of the unused allocations to following years.

This case clearly does not involve racial discrimination, economic status discrimination or discrimination between residents and non-residents. In short, it does not involve discrimination in any manner, shape or form. This non-discriminatory feature of the Plan was clearly recognized by the Court of Appeals:

> "Although appellees have attempted to align their business interests in attacking the Plan with legitimate housing needs of the urban poor and racial minorities, the Association has not alleged nor can it allege, based on the record in this case, that the Plan has the purpose and effect of excluding poor persons and racial minorities. Cf. *Board of County Supervisors of Fairfax County v. Carper,* 200 Va. 653, 107 S.E. 2d 390 (1959). Contrary to the picture painted by appellees, the Petaluma Plan is 'inclusionary' to the extent that it offers new opportunities, previously unavailable, to minorities and low and moderate-income persons. Under the pre-Plan system

> single family, middle-income housing dominated the Petaluma market, and as a result low and moderate income persons were unable to secure housing in the area. The Plan radically changes the previous building pattern and requires that housing permits be evenly divided between single family and multi-family units and that approximately eight to twelve per cent of the units be constructed specifically for low and moderate income persons."

(Petition, App. B, at 55 n. 16)

The District Court adjudged the Plan to be invalid solely on the ground that it violated the constitutional right to travel. The City secured from Mr. Justice Douglas a stay of the District Court's judgment pending appeal.

In its appeal the City was supported by the following amici:

The Attorney General of the State of California;
Natural Resources Defense Counsel, Inc. and Sierra Club;
Joint Center for Urban Studies of the Massachuetts Institute of Technology and Harvard University;
Environmental Defense Fund;
The County of Marin, California;
The City of Los Angeles;
The following California cities:
Walnut Creek, Burbank, Corona, Norco, Pasadena, San Diego, Livermore, Pleasanton, Lafayette, Pleasant Hill, Vallejo, Hayward, Richmond, Mountain View, San Jose, Chico, Sacramento, Santa Ana, Thousand Oaks, Davis, Concord, Benicia, Fullerton, Riverside, Irvine, Yorba Linda, Palo Alto, San Juan Capistrano, McFarland and Tehachapi.

The Court of Appeals, in unanimously reversing the judgment of the District Court, determined that the Peti-

tioners did not have standing to raise the issue of right to travel, and that the Plan did not violate the due process or commerce clauses and was therefore valid and constitutional.

ARGUMENT

I.

PETITIONERS HAVE NO STANDING TO ASSERT THE RIGHT TO TRAVEL

Petitioners are two trade associations whose members are real estate developers and homebuilders, one owner of property outside the City of Petaluma, and an owner of property substantially all of which is outside the City of Petaluma. Thus all of the petitioners are persons or entities engaged in or interested in land development. Without alleging or establishing any representative or derivative capacity, petitioners seek to represent unnamed and unnamedable persons whose right to travel is allegedly being infringed by the Plan. These people are allegedly being frustrated in their efforts to move from points unknown to Petaluma. It is evident that the primary concern of petitioners, however, is really an alleged "right" to build residential units wherever and whenever they choose, regardless of local land use regulations. Petitioners seek to advance their economic interests by masquerading under the attempted assertion of a right to travel on behalf of a group to which petitioners bear no demonstrable connection. None of the petitioners is in the category of persons who may claim a right to migrate and settle as part of the right to travel, nor have they established the kind of relationship to such persons that would permit them to assume representation of the interests of such persons. Petitioners thus have no standing to raise the right to travel issue.

This Court's recent decision in *Warth v. Seldin,* 45 L.Ed.2d 343 (June 25, 1975) is fully dispositive of the standing issue. In that case an attack was made by a group of low-income and minority-group plaintiffs on the validity of the zoning regulations of the incorporated municipality of Penfield, a suburb of Rochester, New York, it being contended that the zoning regulations effectively prevented minority and low and moderate income people from living in the town. A home builders association comprised of firms engaged in residential construction in the Rochester area, including Penfield, sought to intervene. An organization known as the Housing Council, made up of members interested in housing problems, petitioned to be joined as a party plaintiff. It was alleged that one of the members of the Housing Council, Penfield Better Homes Corporation, "is and has been actively attempting to develop moderate income housing" in Penfield "but has been stymied by its inability to secure the necessary approvals." Standing was denied to the low-income and minority-group plaintiffs, and on the same ground of lack of standing the petition of the homebuilders association to intervene was denied and the Housing Council was refused permission to be joined as a party plaintiff.

In the Petaluma case, the Court of Appeals for the Ninth Circuit denied standing to petitioners to raise the right to travel issue on the direct authority of *Warth,* using the following language:

"A corollary to the 'zone of interest' requirement is the well-recognized general rule that 'even when the plaintiff has alleged injury sufficient to meet the "case or controversy" requirement, . . . the plaintiff must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.' *Warth v. Seldin,* ____ U.S. ____, ____, slip op. at 8 (1975); accord, *United States v. Raines,* 362 U.S. 17, 21 (1960); *Barrows v. Jackson,* 346 U.S. 249, 256 (1953).

". . . their economic interests are undisputedly outside the zone of interest to be protected by any purported constitutional right to travel. Accordingly, appellees' right to travel claim 'falls squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves.' *Warth v. Seldin,* U.S. at ____, slip op. at 18."

(Petition, App. B, at 44-46)

In short, the Court of Appeals gave careful and detailed consideration to the issue of petitioners' standing to raise a right to travel claim, and correctly applied the prior decisions of this Court in concluding that petitioners lacked standing. The instant case presents no new considerations which might warrant review by the Court.

II.

IN ANY EVENT, THE RIGHT TO TRAVEL HAS NO APPLICATION TO LAND USE REGULATIONS WHICH GIVE EQUAL TREATMENT TO RESIDENTS AND NON-RESIDENTS ALIKE.

The Plan, as described above, provides a fair and reasonable system designed to ensure that new housing in the Petaluma area will be constructed and located in an orderly and rational manner, thereby promoting and protecting the health, safety and well being of the citizenry. The Plan's regulations and policies apply equally to all and in no way singles out only those who have traveled. Yet, in every case in which the Supreme Court has found a violation of the right to travel, the challenged regulation has on its face singled out for disadvantageous treatment only those who have traveled. In the *Passenger Cases,* 48 U.S. (7 How.) 300, 12 L.Ed. 702 (1849), the statutes in question imposed a tax on alien passengers landing at state ports. In *Crandall v. Nevada,* 73 U.S. (6 Wall.) 35, 18 L.Ed. 745 (1868), the Court struck down a tax of one dollar a head imposed on the exit of persons from the State of Nevada. In *Edwards v. California,* 314 U.S. 160, 86 L.Ed. 119 (1941), the challenged statute prohibited the introduction of indigent persons into the State of California. And more recently, in *Shapiro v. Thompson,* 394 U.S. 618, 22 L.Ed.2d 600 (1969), *Dunn v. Blumstein,* 405 U.S. 330, 31 L.Ed.2d 274 (1972), and *Memorial Hospital v. Maricopa County,* 415 U.S. 250, 39 L.Ed.2d 306 (1974), residency requirements barring new residents from receiving welfare, from voting, and from receiving free medical services, were invalidated.

Thus, while many local and state regulations, including those governing land use, may have an indirect impact on

the right to travel in the sense that the restriction of such regulations may cause some to believe that the city or state imposing the regulations is a less desirable place to live, there is no violation of the right to travel unless the regulations are more restrictive for new residents. This point was recognized by the Court of Appeals in its decision in this case:

> "The plaintiffs in *Belle Terre* claimed *inter alia* that the ordinance interfered with a person's right to travel and right to migrate to and settle within a state.
>
> The Supreme Court held that since the ordinance was not aimed at transients, there was no infringement of anyone's right to travel. 416 U.S. at 7. Although due to appellees' lack of standing we do not reach today the right to travel issue, we note that the Petaluma Plan is not aimed at transients, nor does it penalize those who have recently exercised their right to travel. See *CEEED v. California Coastal Zone Conservation Comm'n,* 43 Cal.App.3d 306, 118 Cal. Rptr. 315, 332-334 (1974); cf. *Dunn v. Blumstein,* 405 U.S. 330, 342 (1972)."

(Petition, App. B, at 52-53 n.13).

The Petaluma Plan does not single out newcomers for special and disadvantageous treatment; both newcomers and persons residing in Petaluma who are seeking new housing have equal access to the available housing on the market. Like virtually all land use regulation, the Petaluma Plan's indirect effect on the production and cost of housing is felt equally by all, regardless of whether one is migrating from New York to Petaluma, or only moving around the corner in search of a larger home for a growing family.

The error inherent in the expansion of the right to travel into the area of land use regulation, as urged by petitioners, was underscored by this Court's flat rejection of such an expansion last term in *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974). There a New York village ordinance which restricted land use to one family dwellings, excluding lodging, boarding, fraternity or multiple dwelling houses, and defined the word "family" to mean one or more persons related by blood, adoption, or marriage, or not more than two unrelated persons, living and cooking together as a single housekeeping unit, was challenged as violating, *inter alia,* the right to travel. The Court dismissed this assertion quickly, holding that the ordinance *"involves no 'fundamental' right guaranteed by the Constitution.* . . . We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' and bear 'a rational relationship to a (permissible) state objective.'" *Belle Terre,* supra, 416 U.S. at 7-8 (emphasis added) (citations omitted).

Moreover, Mr. Justice Marshall, while dissenting on the grounds that the ordinance burdened the exercise of First Amendments rights, concurred in this Court's express holding that there existed a broadly defined zoning power wholly free from limitations imposed by the right to travel:

> "I would also agree with the majority that local zoning authorities may properly act in furtherance of the objectives asserted to be served by the ordinance at issue here: *restricting uncontrolled growth,* solving traffic problems, keeping rental costs at a reasonable

level, and making the community attractive to families."

416 U.S. at 13 (emphasis added)

III.

THE DECISION OF THE COURT OF APPEALS IS IN STRICT ACCORD WITH ALL EXISTING AUTHORITY

In this case the Court of Appeals carefully applied the test by which the validity of land use regulations has been measured since *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)—whether the regulations are a reasonable exercise of the police power. The court stated:

> "It is well settled that zoning regulations 'must find their justification in some aspect of the police power, asserted for the public welfare.' *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926). The concept of the public welfare, however, is not limited to the regulation of noxious activities or dangerous structures. As the Court stated in *Berman v. Parker*, 348 U.S. 26, 33 (1954):
>
> > The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.
>
> (citations omitted). *Accord, Village of Belle Terre v. Boraas*, 416 U.S. 1, 6, 9 (1974).
>
> "In determining whether the City's interest in preserving its small town character and in avoiding uncontrolled and rapid growth falls within the broad concept of 'public welfare', we are considerably assisted by two recent cases. *Belle Terre*, supra, and *Ybarra v. City of Town of Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974), each of which upheld as not unreasonable a zoning regulation much more restrictive than the Petaluma Plan, are dispositive of the due process issue in this case."

(Petition, App. B, at 51-52)

The court then discussed at length the holdings in *Belle Terre* and *Los Altos Hills*:

> "Both the Belle Terre ordinance and the Los Altos Hills regulation had the purpose and effect of permanently restricting growth; nonetheless, the court in each case upheld the particular law before it on the ground that the regulation served a legitimate governmental interest falling within the concept of the public welfare: the preservation of quiet family neighborhoods (Belle Terre) and the preservation of a rural environment (Los Altos Hills). Even less restrictive or exclusionary than the above zoning ordinances is the Petaluma Plan which, unlike those ordinances, does not freeze the population at present or near-present levels. Further, unlike the Los Altos Hills ordinance and the various zoning regulations struck down by state courts in recent years, the Petaluma Plan does not have the undesirable effect of walling out any particular income class nor any racial minority group."
>
> "We conclude therefore that under *Belle Terre* and *Los Altos Hills* the concept of the public welfare is sufficiently broad to uphold Petaluma's desire to preserve its small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace."

(Petition, App. B, at 54-55, 57)

Petitioners contend that the Petaluma Plan is an "admittedly exclusionary land-use ordinance." Nothing of the sort has even been admitted. In fact, as pointed out above, the Court of Appeals characterized the Plan as "inclusionary" rather than exclusionary. The Court of Appeals properly recognized that "Practically all zoning restrictions have as a purpose and effect the *exclusion* of some activity or structure or a certain density of inhabitants." (Page 51) Petitioners apparently have seized upon this statement of a universally recognized characteristic of zoning regulations in their attempt to liken the Petaluma Plan to those local land-use regulations that have been invalidated by the highest state courts of Pennsylvania and New Jersey on the ground that they were "exclusionary". Petitioners clearly misunderstand not only the intrinsic nature of zoning regulations but also the very narrow and specialized applicability of the so-called "exclusionary zoning" theory.

The Court of Appeals, recognizing the exclusionary nature of all zoning regulations, clearly delineated the province of the court in passing upon the validity of such regulations:

> ". . . in reviewing the reasonableness of a zoning ordinance, our inquiry does not terminate with a finding that it is for an exclusionary purpose. We must determine further whether the *exclusion* bears any rational relationship to a *legitimate state interest*. If it does not, then the zoning regulation is invalid. If, on the other hand, a legitimate state interest is furthered by the zoning regulation, we must defer to the legislative act. Being neither a super legislature nor a zoning board of appeal, a federal court is without authority to weigh and reappraise the factors considered or ignored by the legislative body in passing the challenged zoning regulation. *The reasonableness, not the wisdom, of the Petaluma Plan is at issue in this suit.*"

(Petition, App. B, at 51) (last emphasis added)

The Ninth Circuit Court of Appeals decision conflicts neither with any past decision of the Supreme Court nor with that of any other circuit. It makes no new law but rather is entirely consistent with well-established principles long ago set forth by the Court. These principles are sound and make good sense and no justification for departure from them had been demonstrated.

IV.

THE VALIDITY OF A LOCAL LAND-USE REGULATION IS NOT DETERMINED BY ITS REGIONAL EFFECT. IN ANY EVENT, THE PETALUMA PLAN IS IN FURTHERANCE OF THE GENERAL WELFARE EVEN IF MEASURED BY REGIONAL IMPACT.

Petitioners continue to assert that the validity of local land-use regulations must be determined upon the basis of their regional impact. While it is true that a local land-use regulation may have an effect upon the surrounding region, it does not follow that the constitutional validity of the regulation is determined upon that basis. The Court of Appeals clearly stated the law in this regard:

> "Although we assume that some persons desirous of living in Petaluma will be excluded under the

housing permit limitation and that, thus, the Plan may frustrate some legitimate regional housing needs, the Plan is not arbitrary or unreasonable. We agree with appellees that unlike the situation in the past most municipalities today are neither isolated nor wholly independent from neighboring municipalities and that, consequently, unilateral land use decisions by one local entity affect the needs and resources of an entire region. *See, e.g., Golden v. Planning Board of Town of Ramapo,* 30 N.Y.2d 359, 285 N.E. 2d 491, 334 N.Y.S.2d 138, *appeal dismissed,* 409 U.S. 1003 (1972); *National Land & Investment Co. v. Kohn,* 419 Pa. 504, 215 A.2d 597 (1965); Note, *Phased Zoning: Regulation of the Tempo and Sequence of Land Development,* 26 Stan. L. Rev. 585, 605 (1974). It does not necessarily follow, however, that the *due process* rights of builders and landowners are violated merely because a local entity exercises in its own self-interest the police power lawfully delegated to it by the state. *See Belle Terre,* supra; *Los Altos Hills,* supra. If the present system of delegated zoning power does not effectively serve the state interest in furthering the general welfare of the region or entire state, it is the state legislature's and not the federal courts' role to intervene and adjust the system. As stated *supra,* the federal court is not a super zoning board and should not be called on to mark the point at which legitimate local interests in promoting the welfare of the community are outweighed by legitimate regional interests. *See* Note, *supra,* at 608-11."

(Petition, App. B, at 56-57)

It is interesting to note that the Court of Appeals assumed "that some persons desirous of living in Petaluma will be excluded under the housing permit limitation." While this assumption may be legitimate, there is nothing in the record which directly supports it. There are no allegations or proof in this case that there is any shortage of housing in Petaluma or that any person seeking housing in Petaluma has been unable to find it.

Even if regional impact is adopted as part of the test to determine the validity of a local land-use regulation, it is submitted that the Petaluma Plan is in furtherance of the general welfare and therefore valid.

It is a legitimate function of the exercise of the zoning power to restrict uncontrolled growth and a local governmental entity has broad discretion in selecting the means to implement such objective. In *Belle Terre,* Mr. Justice Marshall dissented from the majority opinion but concurred with the Court's holding that the zoning power is extremely broad:

> "(L)ocal zoning authorities may properly act in furtherance of the objectives asserted to be served by the ordinance at issue here: *restricting uncontrolled growth,* solving traffic problems, keeping rental costs at a reasonable level, and making the community attractive to families. The police power which provides the justification for zoning is not narrowly confined. And, it is appropriate that we afford zoning authorities *considerable latitude in choosing the means by which to implement such purposes.*"

416 U.S. at 13-14 (emphasis added)

Any zoning measure which restricts uncontrolled growth in one community *may* have an effect on the demand for growth in another community, but uncontrolled growth in any community is inimical to the general welfare.

While different communities may select different means to accomplish the same objective, the general welfare is served where the police power test stated by the court in *Belle Terre* is met:

> "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker,* supra. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."

416 U.S. at 9

Moreover, virtually every modern case relied upon by petitioners to support their vague assertion that regional needs are the touchstone for review of local land use regulation, involved the exclusion from a community of a particular type of land use—whether low or moderate income housing, small lot development, apartments or mobile homes—all of which the Petaluma Plan actively encourages.

To suggest, as petitioners do here, that the proper manner of resolution of possible conflicts between regional and local needs in land use planning is the blunt instrument of constitutional law is to belie the enormous complexity of the task the federal courts are being invited to assume. Local government has no authority over regional problems, yet it is asserted that they are constitutionally mandated to solve them. Moreover, regional needs may be defined differently by different localities. Most

importantly, regions have a variety of needs, only one of which is housing, and all of which may conflict. To place the Federal courts in the position of arbiter of these conflicts is to make the courts not just a zoning board of appeals, but a legislature.

CONCLUSION

The Petaluma Plan is an effort by a relatively small community to manage its anticipated residential growth in a reasonable, well-balanced, non-chaotic manner. It is not an attempt to curtail or limit growth necessarily, but rather to provide some order to the amount of growth that could be reasonably anticipated from previous experience. The number of residential units permitted to be built annually under the Petaluma Plan is substantially the same as the average annual rate for the five year period 1967-1971. Thus the number used has a sound basis and is not an arbitrary or unreasonable figure.

It is inherent in the very concept of land use regulation that there will be an incidental effect of reducing the amount of residential construction to less than market demand (although respondents submit that petitioners have not proven this to be the case with respect to Petaluma.)

The Court of Appeals has held that the Plan is a reasonable and legitimate exercise of the City's police power and is therefore valid and constitutional. The decision of

the Court of Appeals is in accord with all authority and should stand; the petition for a writ of certiorari should be denied.

Dated, January 26, 1976.

Respectfully submitted,

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(Appendix Follows)

APPENDIX

Appendix

DEVELOPMENT POLICY.

"A. In order to protect its small town character and surrounding open space, it shall be the policy of the City to control its future rate and distribution of growth. A five-year development strategy is feasible and shall be based on the following criteria:

1. Development rate shall be tied to school and utility capacity and the balance or imbalance shall be constantly monitored and adjusted.
2. A growth rate of about 500 dwelling units anually shall be the City's growth policy.
3. The County is hereby solicited to ensure that all urban and suburban development in the vicinity of Petaluma is approved by and is acceptable for annexation to the City without exception.
4. An east-west balance shall be encouraged in considering new development.

B. It shall be the policy of the City to provide a wide choice in types of dwellings and environments consistent with Petaluma's essentially suburban character.

C. It shall be the policy of the City to ensure a permanent greenbelt of open hills and marshlands together with open space for recreation and for definition of urban form.

. . .

D. It shall be the policy of the City to protect and enhance those elements which add beauty and character to the community.

. . .

"II. Policies Affecting Residential Development

A. It shall be the policy of the City to improve subdivisions and zoning regulations and others controls over development to implement both the broad policies of growth and environmental quality and variety in residential areas.

1. Proper planning and zoning will require Environmental Design Plans, Planned Community Districts, and Planned Unit Development procedures to gain the best design possible from large-scale land development.

2. The strategy for the next five years shall be to redress the present deficiency in multi-family units in Petaluma, and the zoning ordinance will include bonus allowances to encourage better apartment design and site planning.

3. The zoning ordinance will provide for variety in densities and building types and thus, wide ranges of prices and rents. Acceptable quality shall be maintained at all levels through good site and architectural design and maximum use of available Federal subsidies, as local conditions warrant.

4. All available laws will be used to ensure that schools, parks, and greenbelts are provided as part of the residential development process.

5. Historically important structures shall be protected.

6. Petaluma will encourage the continued construction of apartments designed for families with children and pets.

7. The ordinance will provide for both mobile homes and modular housing, will distinguish between the two and avoid any tendency for manufactured units to be clustered in any one section of the City.

B. The following steps are deemed to be effective to encourage appropriate location of needed multi-family development.

1. A limited amount of high density housing will be encouraged near the Central Business District and above commercial uses.

2. Remodeling of old single-family houses to apartments in close-in areas will respect historic character of such houses and special zoning regulations will ensure that any new apartment buildings will be compatible with older structures.

3. Apartments will be encouraged on the east side as well as the west side of Petaluma to provide more variety of population and environment."

. . .

(Plaintiffs' Exhibit No. 1-5, at 31-33)

ENVIRONMENTAL DESIGN PLANS.

. . .

"Five years is a suitable time period for strategic planning. It assumes that the City should and can control its short-range future since it can foresee with reasonable assurance what its problems are and how much growth it can accommodate while maintaining an adequate level of public service and a good environment. Since 500 dwelling units annually is pretty close to the City's average during the past decade, neither the adopted policy statement nor the Environmental Design Plan actually will arrest Petaluma's growth. Nor do these plans really restrict the opportunity of private property owners to develop their land. Even without guidance from a five year Environmental Design Plan, very little subdivision activity has occurred except adjacent to existing development. As this report makes clear, it is the magnitude of the market for developed real estate in Petaluma's vicinity that drastically reduces the likelihood that any particular parcel outside the City will be developed in the next five years. *The Environmental Design Plans have the sole purpose of contributing to Petaluma's future welfare by ensuring that development in the next five years, will take place in a reasonable, orderly, attractive manner, rather than in a completely haphazard and unattractive manner*" (emphasis added)

. . .

(Plaintiffs' Exhibit No. 1-5, at 1)

HOUSING ELEMENT OF THE GENERAL PLAN.

". . . the recommended Residential Development Program is a response to the City's desire to formulate and adopt policies and plans which will orient future residential development in Petaluma in accordance to public choice. *It is, in effect, an effort to allow the City to control its growth in a manageable and environmentally conscious manner rather than simply reacting to unimpeded development.* (emphasis added)

"The Environmental Design Plans serve the purpose of providing a functional framework for the overall development of Petaluma during the next five years. The Housing Element must in turn extract guideline policies for residential construction during the period 1973-1977 . . ."

(Plaintiffs' Exhibit No. 1-8, at 18)

RESIDENTIAL DEVELOPMENT CONTROL SYSTEM.

"It is the adopted policy of the City of Petaluma to establish control over the quality, distribution, and rate of growth of the City in the interest of:

Preserving the quality of the community;

Protecting the green open-space frame of the City;

Insuring the adequacy of City facilities and services within acceptable allocation of City and school tax funds;

Insuring a balance of housing types and values in the City which will accommodate a variety of families including families of moderate income and older families on limited, fixed incomes, and

Insuring the balanced development of the City east, north, and west of the central core.

"These policies are more completely set forth in the Official Statement of Development Policy for the City of Petaluma, adopted by the City Council, Resolution No. 5760 N.C.S., June 7, 1971.

"The policies of the City are given increasingly specific form in three documents:

1. The Petaluma General Plan adopted March 5, 1962, and as subsequently amended from time to time.
2. The Petaluma Environmental Design Plans adopted March 27, 1972.
3. The Housing Element of the General Plan adopted _____.

"The General Plan establishes long-range general development policy. The Environmental Design Plan establishes medium-range and more specific and detailed development policy directed to the development period 1973-1977. The Housing Element of the General Plan defines the housing policy goals of the City and establishes a proposed Residential Development Program 1973-1977 as set forth in page 24 of the Housing Element.

"It is the purpose of this Residential Development Control System to implement the policies of the City of Petaluma as recorded in the Development Policy Resolution and the three official documents referred to above . . ."

(Plaintiffs' Exhibit No. 1-7, at 1)

Supreme Court, U. S.
FILED
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1975

No. 75-923

CONSTRUCTION INDUSTRY ASSOCIATION OF SONOMA COUNTY, a California non-profit corporation, THE SAN FRANCISCO, PENINSULA AND REDWOOD EMPIRE BUILDING INDUSTRY ASSOCIATION, a California non-profit corporation, PETALUMA PARTNERS, a California limited partnership, and WILLIAM LAWRENCE,
Petitioners,

vs.

THE CITY OF PETALUMA, a California Charter City, HELEN PUTNAM, ROBERT A. BRUNNER, JOHN W. CAVANAGH, ROBERT E. DALY, JAMES L. HARBERSON, FRED V. MATTEI, and WILLIAM A. PERRY,
Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I. SUMMARY OF THIS REPLY BRIEF

This reply brief is limited to four points.

First. Respondents have denied that petitioners have personal standing, ignoring facts that led the court of appeals to state that petitioners "easily satisfied" the requirements for personal standing.

Second. Respondents' statement of the case makes unsupportable claims and contradicts district court findings left undisturbed by the court of appeals.

Third. Respondents rely on the court of appeals' commendation to the city for increasing multiple-family dwellings and for making provision for an annual allotment of low-income units among the 500-unit quota. In fact, the city concedes in the plan that low-income housing is an impossibility for private industry to produce without substantial, and no longer available, federal subsidies. The annual "low-income" allotment is merely a permissive element of the plan, which does not solve the problem of industry's inability to produce low-income housing.

Fourth. Respondents assert that no local land-use regulation should be measured by its effect on other communities in its region. This parochial position is symptomatic of the philosophy that has produced proliferating barriers to migration in many major metropolitan regions. Respondents defend their exclusion in the name of preserving Petaluma's small town character, ignoring the distinction made in both state and federal courts between growing cities in major urban areas and small towns already built to capacity or situated in rural regions with little demonstrable part to play in essential housing production.

II. RESPONDENTS HAVE CAST THE FACTS OF THE CASE IN SUBSTANTIAL CONTRADICTION OF THE DISTRICT COURT FINDINGS.

Respondents challenge petitioners' stake in this litigation as "really an alleged 'right' to build residential units wherever and whenever they choose, regardless of local land use regulations." [Respondents' brief at 6] Citing this court's decision in *Warth v. Seldin,* 45 L.Ed.2d 343 (June 25, 1975), respondents imply that petitioners lack the direct stake in the outcome of this litigation that supports personal standing and claim that petitioners are incompetent to represent the interests of housing consumers.[1]

The facts that support petitioners' direct standing are not difficult to find in the record. The Construction Industry Association demonstrated that the Petaluma plan's 1973 reduction in housing starts and its impact on property values on land owned by its members in Petaluma produced damages substantially in excess of the jurisdictional minimum [C.T. 250-251, 259-260, 270, 433] An officer of the association projected the loss to members of the Construction Industry Association over the ostensible life of the plan at seven million dollars, and the loss to the association itself in diminished dues from members was substan-

---

[1]Although respondents also rely on *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974), discussed in Part IV below, they overlook the holding in that case that the lessors had standing to represent the interests of their tenants, even though the tenants had since departed and were no longer involved in the litigation. While Justice Brennan dissented on the grounds of a lack of case or controversy, the majority held that the lessors' economic stake in the rental value of their house was sufficient to confer complete standing. 416 U.S. 1, 9-10.

tially in excess of the jurisdictional minimum. [C.T. 250-251, 433]

William Lawrence owns property at the northern outskirts of Petaluma, which in past years was open to development. [Plaintiffs' Exhibit 1-2] He was induced by the city to join a sewer district, increasing the taxes assessed to his property, and the assessor appraised his land as a potential subdivision. The Petaluma plan totally excludes his property from development for at least five years, leaving him an income from the property that is less than his taxes. Lawrence did not apply for an allocation for housing units under the Petaluma plan, because the plan prohibited the allocation. [C.T. 252-253; R.T. 164-165]

Petaluma Partners is a California limited partnership that owns property on the outskirts of Petaluma and that applied for an allocation under the Petaluma plan for fiscal year 1973, the year this litigation was filed. Petaluma Partners alleged that it met every reasonable and objective criterion for approval but the city refused the requested allocation, giving no reason for its disapproval. [C.T. 254-255, 270, 277]

Respondents have also been careless with the facts going to the merits of the litigation.

Respondents claim that the Petaluma plan is an effort by the city to "manage its *anticipated* residential growth" and "not an attempt to curtail or limit growth necessarily." [Respondents' brief at 19, emphasis added] The district court did not agree, finding that the plan "limited new housing units to approximately one-third to one-half of the demographic and

market demand of 1970-1971." [Petition, Appendix A at 4] The city intended the Petaluma plan "to exclude substantial numbers of people who would otherwise have elected to immigrate into the city." [Petition, Appendix A at 18; see also Appendix A at 3 and 7]

Likewise, respondents insist that the plan is only a five-year plan, although the trial court expressly found that the city had attempted to perpetuate the plan into 1990. [Appendix A at 10]

The court of appeals did not contradict the district court's findings. Instead it agreed that one of the purposes of the Petaluma plan was to "retard the accelerating growth of the City." [Petition, Appendix B at 38.][2] The court of appeals also accepted the district court's findings that the plan was designed to endure long past its nominal termination in 1977. [Appendix B at 38 n.1]

Although respondents state that the Petaluma plan was to be a "coordinated response to a broad range of pressing municipal concerns, *including the inadequacy of public facilities (principally water supply and sewage treatment facilities)*" [Respondents' brief at 2, emphasis added], no such problems were identified in any of the plan elements *(e.g.,* Plaintiffs' Exhibit 1-5 at 5-6). Only after this litigation was

---

[2]The court of appeals questioned in passing the city's exemption from the plan of projects of four units or less [Appendix B at 39, 41-42], but assumed the trial court was correct in assessing the restrictive effects of the 500-unit limitation [Appendix B at 42]. The city always understood that, even exempting small projects, the plan would be effective to "roll back" the city's growth rate to the level of the 1960s. [Plaintiffs' Exhibit 1-5 at 2]

filed did respondents first suggest that water supply and sewage treatment facilities might be inadequate, a suggestion so repudiated by the evidence at trial that the district court found that it was an afterthought designed to justify the plan after its adoption. [Appendix A at 7-10; Appendix B at 41 n.5]

III. NEITHER THE CITY'S PROVISIONS FOR MULTI-FAMILY DWELLINGS NOR FOR TOKEN ALLOCATIONS EACH YEAR TO LOW-INCOME HOUSING OVERCOME THE CITY'S INTENT AND THE EFFECT OF ITS PLAN TO USE HOUSING SCARCITY AS A BARRIER TO NEW RESIDENTS.

The court of appeals did not challenge the trial court's findings on the demographic effects of the Petaluma plan. [Petition, Appendix A at 10-17; Appendix B at 42] Instead, the court identified the city's encouragement of a mix of housing types and the city's provision for an annual allocation for low-income housing as "inclusionary" aspects of the city's plan.

The court of appeals was in error in believing that the Petaluma plan required eight to twelve percent of the annual residential unit allocations to be for low or moderate-income families. [Appendix B at 55-56 n.16] The bonus points for this type housing were permissive, not mandatory, and the city recognized that it would be virtually impossible for the private market to supply this type of housing.

> It is important to realize that the private sector can no longer provide housing for this income group due to the fact that their lower incomes

> cannot meet the prices of the conventional housing market. As land, material, construction and perhaps even financing, rise over time, a greater proportion of Petaluma's older and younger population will not be able to exercise choice in the housing market. For these reasons, the city must begin to consider the Federal programs which offer financial assistance to families with insufficient incomes.
>
> It is also important to realize that this is not an instance of attracting "undesirables" into Petaluma by providing low and moderate-income housing. The problem exists among the city's own residents, especially those who have lived in Petaluma the longest.

[Plaintiffs' Exhibit 1-8 at 19-20]

This passage from the housing element shows that the city recognizes that no low and moderate-income housing will be created without federal assistance. Furthermore, the purpose of the provision for low and moderate-income units in the Petaluma plan is itself exclusionary, certainly in the sense that only present residents are provided for—and not enough units even for them—but in any event not those persons of low and moderate income who might wish to migrate to Petaluma.

When all has been said of the Petaluma plan, its macroscopic constraints on housing supplies, and its microscopic provisions for multiple-family units and potential allotments of low-income housing among the annual quota, one conclusion is clear. By appearing to encourage more desirable and necessary types of

housing while drastically reducing supply below demand, the city insured that potential residents would be excluded who could very much have used the variety of housing types that the city declined to permit the petitioners to produce.

How much low-income housing has been produced under the plan the record does not reveal, having been made in the plan's early days. If this Court desires that the record be brought current on this issue petitioners would welcome reference of the question to the federal master appointed by the district court, Ira Michael Heyman, Vice-Chancellor of the University of California at Berkeley and a noted land-use authority and environmental scientist in his own right.

IV. EXTRATERRITORIAL EFFECTS OF LOCAL LAND-USE REGULATION ARE LEGITIMATE ELEMENTS IN DETERMINING THE CONSTITUTIONALITY OF COMMUNITY LEGISLATION "FOR THE GENERAL WELFARE," JUST AS NEGATIVE EXTERNALITIES CREATED BY PRIVATE USE OF LAND HAVE READILY JUSTIFIED CONTROLS ON LAND USE BY TRADITIONAL ZONING AND OTHER TOOLS.

The city flatly asserts that "the validity of a local land-use regulation is not determined by its regional effect" [Respondents' brief at 15], a disquieting and regressive argument that the court of appeals appears to condone and that has unsettled even the city's environmentalist friends. See, *e.g.*, Comment, *How Slow Can You Grow? Ninth Circuit Upholds Constitutionality of Petaluma's Growth Control Plan,* 5 Envir. L. Rep. 10169 (July 1975).

The respondents pass off as distinguishable on their facts all of the decisions of state courts of last resort discussed in the petition and concentrate their argument on the contention that *Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974) controls here.

Respondents make an error in failing to distinguish between small towns that are either already fully developed or are isolated from urban centers and growing communities that are integral parts of metropolitan housing markets. This distinction has been made in both state and federal courts and should be obvious in any event. It is a distinction that makes Petaluma's "small town character," while no less a legitimate interest of its residents, only one element in the balance for a major suburban growth center like Petaluma.

Steel Hill Development, Inc. v. Town of Sanbornton, 469 F.2d 956 (1st Cir. 1972), in a thoughtful opinion by Chief Judge Coffin, explains very carefully the different considerations that govern land-use restrictions on housing in rural, second-home areas and major metropolitan suburbs.

> Appellant relies heavily on National Land and Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965) [and other cases] for the proposition that Sanbornton may not use a zoning ordinance to avoid "the increased responsibilities and economic burdens which time and natural growth invariably bring." . . . This proposition, invulnerable in its cloak of generality, does not quite suit the present case. All these cases refer to an unnatural limitation of suburban expansion into towns in the path of population growth where a

too restrictive view of the general welfare was taken. Comment, 50 Journal of Urban Law 129 (1972). . . . These different problems of suburban and rural expansion, their scientific and legal analyses, and their appropriate solutions cannot so easily be equated. . . .

We are faced with "a local legislative determination that the general welfare will be promoted by exclusion of an unwanted use from a non-metropolitan community [which exclusion] is not likely to conflict with a regional need for local space for that use." [Note, 57 Iowa L. Rev. 126, 140 (1972)] . . .

Yet, though it may be proper for Sanbornton to consider the foregoing factors, we think the town has done so in a most crude manner. . . . [W]e have serious worries whether the basic motivation of the town meeting was not simply to keep outsiders, provided they wish to come in quantity, out of the town. We cannot think that expansion of population, even a very substantial one, seasonal or permanent, is by itself a legitimate basis for permissible objection. . . . Where there is natural population growth it has to go somewhere, unwelcome as it may be, and in that case we do not think it should be channelled by the happenstance of what town gets its veto in first. . . .

469 F.2d 956, 960-962.

The responsibilities of former rural communities finding themselves newly subject to an expanding metropolitan region has been considered in two recent New Jersey cases. In *Segal Construction Co. v. Borough of Wenonah,* 134 N.J. Super. 421, 341 A.2d

667 (1975), the court found that the borough was not a developing community under the distinction established by the New Jersey Supreme Court in *Southern Burlington County NAACP v. Mt. Laurel Township,* 67 N.J. 151, 336 A.2d 713, appeal dismissed, 46 L.Ed. 2d 28 (1975):

> As already intimated, the issue here is not confined to Mount Laurel. The same question arises with respect to any number of other municipalities of sizeable land area outside the central cities and older built-up suburbs of our North and South Jersey metropolitan areas (and surrounding some of the smaller cities outside those areas as well) which, like Mount Laurel, have substantially shed rural characteristics and have undergone great population increase since World War II, or are now in the process of doing so, but still are not completely developed and remain in the path of inevitable further residential, commercial and industrial demand and growth. Most such municipalities, with but relatively insignificant variation in details, present generally comparable physical situations, courses of municipal policies, practices, enactments and results and human, governmental and legal problems arising therefrom. It is in the context of communities now of this type or which become so in the future, rather than with central cities or older built-up suburbs or areas still rural and likely to continue to be for some time yet, that we deal with the question raised.

336 A.2d 713, 717.

The borough of Wenonah closely resembles the village of Belle Terre in both land area and population.

The *Belle Terre* case never suggested that the village was part of a developing metropolitan area. Nor did Justice Douglas, writing for the court in *Belle Terre,* suggest that the exclusion of boarding houses and the like would be legitimate if practiced city-wide in a metropolitan area. The Belle Terre ordinance was held legitimate simply in the context of "a land-use project addressed to family needs." 416 U.S. 1, 9.[3]

V. MANY GROUPS, BUILDERS AND ENVIRONMENTALISTS IN EQUAL MEASURE, ARE IN FEAR THAT THE CHARACTERIZATION GIVEN THE MAJORITY OPINION IN WARTH v. SELDIN BY THE DISSENTS IN THAT CASE, COUPLED WITH THE OPINION OF THE NINTH CIRCUIT IN THIS CASE, WILL DISABLE THE FEDERAL COURTS INDEFINITELY FROM MAJOR TASKS OF CONSTITUTIONAL DIMENSIONS.

It is as much the dissenting opinions in *Warth v. Seldin, supra,* as the majority opinion in that case, that seem to make of *Warth* a case of non-justiciability rather than standing. Although the majority carefully limited its holding to the failure of the

[3]The majority opinion in *Belle Terre* inexplicably spoke of the right to travel as limited to "transients," thus ignoring the right of migration for permanent settlement. 416 U.S. 1, 7. The court of appeals repeated the *Belle Terre* reference to transients as though the court of appeals believed that permanent migration were no longer constitutionally protected. *Cf. Shapiro v. Thompson,* 394 U.S. 618 (1969).

That the right to travel is a valid and fundamental counterpoint to municipal limits on housing production was recently emphasized by a noted jurist, Justice Stanley Mosk of the California Supreme Court, in a speech to a major gathering of environmental lawyers. Speech of Hon. Stanley Mosk, ALI-ABA Environmental Law Course, San Francisco, February 5, 1976; text on file at Misuraca & Beyers, Santa Rosa, California.

Warth plaintiffs to establish a sufficient stake in the outcome of the case, the decision is being read, as the court of appeals here reads it, as defeating the opportunity to litigate land-use issues of constitutional scope in federal courts. See, L. Sager, *Burnt Bridges: Retreat of the Federal Judiciary from Land Use Litigation,* 27 ASPO Land Use Law & Zoning Digest, No. 11 at 7 (1976); R. Babcock, *On the Choice of Forum,* 27 ASPO Land Use Law & Zoning Digest, No. 6 at 7, 8 (1975); Comment, *How Slow Can You Grow? Ninth Circuit Upholds Constitutionality of Petaluma's Growth Control Plan,* 5 Envir. L. Rep. 10169 (1975).

The comment of the Environmental Law Reporter, a publication of the Environmental Law Institute, is representative of the concern even of those who favor the merits of the Petaluma plan.

> Despite its enlightened view of the permissible scope of the local police power to implement land use control measures and its implication that the Petaluma Plan does not abridge anyone's constitutional right to travel, two aspects of the Ninth Circuit's opinion are nonetheless troublesome. The first is the statement that prospective residents allegedly excluded from living in Petaluma by the city's growth control plan could challenge the plan's legality on their own behalf. Although the Ninth Circuit was referring to a right to travel claim, its statement also applies to equal protection and due process claims against an allegedly exclusionary land use ordinance. The problem, however, whether the suit is based on equal protection and due process or on right to travel, is that the standard hurdle constructed by Justice Powell

> for such challenges by non-residents in the recent Supreme Court decision in *Warth v. Seldin* is so high as to be almost insurmountable. . . .
>
> Although right to travel claims against local land use control ordinances should be rejected, prospective low income residents must be able to challenge on equal protection and due process grounds any local zoning or growth control ordinance which has exclusionary effects . . . to prevent municipalities, encouraged by *Petaluma,* from overstepping the proper bounds of the police power in implementing growth controls.

5 Envir. L. Rep. 10169, 10171-72.

When local governments commit constitutional violations that transcend political boundaries, they will find those boundaries thin insulation from the court's writ. *Milliken v. Bradley,* 418 U.S. 717, 755 (1974) (Stewart, J., concurring). The district court's opinion in this case, by making a disciplined attempt to show the interrelationship of the local and regional housing markets, built on *Milliken* toward a rule of law in this troubled area. But it cannot serve to provide the beginnings of a civilized rule to accommodate the environment and man if no court can find a plaintiff who qualifies to bring the issue to court.

Whatever might have been the suspicions of the court of appeals about the motives of the petitioners, whatever the pejoratives put on builders-qua-builders, and whatever may be said to find a builder unworthy to represent the interests of his consumers against mutual threats of housing constraints, one thing is clear. No one can say that the plaintiffs as builders

and land owners in this case inadequately or insensitively presented to the court both the legitimate rights of the city in its environmental concerns and the interests of the migrating American in search of that most basic of all commodities in a democratic society, decent housing. To say that builders lack standing to represent consumers, in the context of the facts developed in this case, is a mockery that makes the concept of standing a potent determent to the redress of grievances in the federal courts.

Respectfully submitted,

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No. 75-923

CONSTRUCTION INDUSTRY ASSOCIATION OF SONOMA COUNTY, A CALIFORNIA NONPROFIT CORPORATION, et al.,
Petitioners,

vs.

THE CITY OF PETALUMA, A CALIFORNIA CHARTER CITY, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE and BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS ON BEHALF OF PACIFIC LEGAL FOUNDATION

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Motion of the Pacific Legal Foundation for leave to file the annexed brief *amicus curiae* is respectfully made pursuant to Rule 42, Rules of the Supreme

Court of the United States. The consent of the attorneys for the petitioners has been obtained. The consent of the attorneys for respondents was requested but refused.

INTEREST OF AMICUS

The Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Policy for the Foundation is set by a seventeen-member Board of Trustees composed of concerned citizens. Ten of the seventeen-member Board are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community.

The court of appeals upheld the Petaluma Plan—a municipal growth control scheme which imposes a limit on construction of residential dwellings far below market demands. Over and above its negative effects on individual property rights, the plan inflicts serious economic, social and environmental harm on the community and region as a whole. This becomes evident upon examination of the three contingencies which the plan creates. First, demands for housing unsatisfied in Petaluma will generate more housing construction in other communities and thereby cause those communities to bear a disproportionate share of

the burdens associated with growth. Secondly, the plan will cause more housing to be constructed in rural and agricultural areas outside of the municipality and thus contribute to urban sprawl. Thirdly, some housing needs, and particularly those of low and moderate income people, will go unsatisfied. The court below recognized the interdependence of communities within a region and the plan's potential to frustrate legitimate regional housing needs, but suggests that it is up to the Legislature to solve this problem.

The Pacific Legal Foundation is concerned by the court of appeal's refusal to require the municipality to consider the interests of those who are situated outside of its boundaries. Pacific Legal Foundation seeks to represent the interests of those adversely affected persons who reside beyond the City of Petaluma. Among the foregoing interests are those of the worker, the unemployed, the consumer and the many families who are and will continue to be faced with the need for decent, affordable housing within reasonable traveling distance of their source of livelihood.

In furtherance of the interests which it seeks to represent, Pacific Legal Foundation will submit its argument that this Court's decision in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), requires a balancing of local and nonlocal interests in determining whether land use legislation is a valid exercise of the police power under the general welfare concept.

For the foregoing reasons, Pacific Legal Foundation respectfully requests leave to file the annexed

brief *amicus curiae* in support of the Petition for Writ of Certiorari.

Respectfully submitted,

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December, 1975.

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OCTOBER TERM 1975

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CONSTRUCTION INDUSTRY ASSOCIATION OF SONOMA COUNTY, A CALIFORNIA NONPROFIT CORPORATION, et al.,
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THE CITY OF PETALUMA, A CALIFORNIA CHARTER CITY, et al.,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITIONERS ON BEHALF OF PACIFIC LEGAL FOUNDATION

INTEREST OF AMICUS

The interest of *Amicus* is set out in the preceding motion for leave to file this brief.

OPINION BELOW

The United States Court of Appeals for the Ninth Circuit, in an opinion reported at 522 F.2d 897

(9th Cir. 1975), reversed the decision of the United States District Court for the Northern District of California (375 F. Supp. 574 (N.D. Cal. 1974)), and held that the respondent City's plan for limiting its population growth was a valid exercise of the police power.

ARGUMENT

I

THE DECISION OF THE COURT OF APPEALS HAS AN IMMEDIATE IMPORTANCE FAR BEYOND THE PARTICULAR FACTS AND PARTIES

The court of appeal's decision in this case comes at a time when there is an urgent national need for more and better housing. Despite this need, housing starts have fallen off badly in the past few years and the prices of new homes have skyrocketed.[1] If allowed to stand, the decision of the court below will worsen the housing situation in this country by encouraging municipalities to severely restrict new residential construction whenever they encounter any real or imagined difficulties in accommodating population growth.

The court below has upheld a municipal ordinance which limits new residential construction to a maximum of 500 development units per year. This was allowed in spite of the fact that market demands greatly exceeded the permitted quota. *Construction Ind. Ass'n. of Sonoma Cty. v. City of Petaluma,* 375 F. Supp. at 575. In addition, the ordinance predetermined the geographical extent of the City's growth with an urban extension line to last for 20 or more years. Population densities within the urban extension line were set at levels of no more than 55,000 people. In the absence of such restrictions, the City was projected to have a population of 77,000. Thus the City's measures would prevent some 22,000 people from residing within its boundaries. *Construction Ind. Ass'n. of Sonoma Cty. v. City of Petaluma,* 375 F. Supp. at 576.

[1] *See Wall Street Journal,* December 10, 1975, at 1, a copy of which has been lodged with this Court under separate cover.

Two questions are raised by these policies. First, where will housing be provided for the 22,000 excluded from housing? Second, what will be the character of the 500 families who do manage to acquire housing annually in Petaluma?

The contingencies that will occur with respect to housing for those excluded are as follows:

1. Additional housing will be built in other existing communities;

2. Housing will be built in areas which are not presently used for urban purposes; and

3. Some of the demand will remain unsatisfied.

Moreover, other communities faced with the prospect of having to handle Petaluma's unwanted growth potential can be expected to shield themselves with growth control plans of their own.[2] For whatever reason these plans are adopted, as more of them

[2] Haar, *Wayne Township: Zoning For Whom?—In Brief Reply,* 66 Harv. L. Rev. 986 (1954).

come into existence, the total number of people excluded from existing communities in the area will increase. As the availability of housing in these communities declines, more housing will be built in non-urban areas, and, because of the need to extend municipal-type services to those areas, the cost of that housing will be greatly increased. *Construction Ind. Ass'n. of Sonoma Cty. v. City of Petaluma*, 375 F. Supp. at 579. Such housing is also costly to the environment. Thousands of acres that should be maintained as farm land or open space will be wasted for urban development that could have been accommodated in already urbanized areas.

In any event, much of the demand for housing that is built up by growth control schemes will remain unsatisfied. This situation is destructive of the filtration process whereby the construction of one new unit makes it possible for a succession of several moves to occur.[3] The process enables the affected parties to attain better housing conditions and is particularly beneficial to those in lower and moderate income categories. Millions of dollars are being spent by the federal government to create better housing conditions. It would be absurd and tragic if the na-

[3]*See New Homes and Poor People, a Study of Chains of Moves*, Survey Research Center at the University of Michigan (1969), a copy of which has been lodged with this Court under separate cover. The study, which was made in seventeen metropolitan areas and involved more than 3,500 interviews, shows that the construction of one new unit makes it possible for a succession of 3.5 moves to occur to different and typically better housing accommodations. *See also* the trial court's opinion below, 375 F. Supp. 574, 580 (1974).

tion's goals of stimulating more and better housing[4] would be frustrated by local goals of limiting housing.

In short, the Petaluma Plan does much more than merely relieve the respondent City of a planning burden and harm the particular economic interests of the petitioners. It also promotes the alarmingly rapid conversion of rural land to urban land and unleashes destructive forces in a housing market that was already falling far short of meeting this country's housing needs. Thus it is evident that this case has an immediate importance far beyond the particular facts and parties involved.

II

IN UPHOLDING THE PETALUMA PLAN THE COURT OF APPEALS USED AN ERRONEOUS CONCEPT OF THE GENERAL WELFARE THAT IS NOT IN HARMONY WITH THIS COURT'S DECISION IN EUCLID v. AMBLER REALTY CO.

In 1926, this Court decided the celebrated case of *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The Court in *Euclid* was faced with a challenge to the municipal land use scheme of Euclid, Ohio, which divided the City into a number of use districts. The challenged scheme was upheld as a valid exercise of the police power. The Court decided that a municipality located in the path of regional industrial development may divert such development in the interest of protecting the health, safety, and welfare of its own residents. However, the Court warned:

> "It is not meant by this, however, to exclude the possibility of cases where the general public

[4]*See* Karlin, *Zoning: Monopoly Effects and Judicial Abdication*, 4 Sw. U. L. Rev. 1, 4-5 n. 10.

interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way." *Id.* at 390.[5]

The *Euclid* caveat has been interpreted by several state courts to require a balancing of municipal interests against larger public interests to determine whether a police power regulation promotes the general welfare and is valid. These courts have not deemed such balancing, whether it be termed local versus regional interests, to be a legislative function. The court of appeals citing *Euclid v. Ambler Realty Co., supra,* recognized that "zoning regulations 'must find their justification in some aspect of the police power asserted for the public welfare'" *Construction Ind. Ass'n. of Sonoma Cty. v. City of Petaluma,* 522 F.2d at 906. The court of appeals also recognized that the concept of the public welfare is broad and inclusive. *Id.* It nevertheless concluded that it was for the legislature to "adjust the system" so that the delegated zoning power would better serve the state interest in furthering the general welfare of the entire region or entire state. *Id.* The court stated it is not the duty of the federal court to "mark the point at which legitimate local interests in promoting the welfare of the community are outweighed by legitimate regional interests." *Construction Ind. Ass'n. of Sonoma Cty. v. City of Petaluma,* 522 F.2d at 908.

There is a glaring inconsistency between the decisions of state courts as regards the concept of the general welfare established by *Euclid* and the court

[5]The above quoted *Euclid* statement will be referred to herein as the *Euclid* caveat.

of appeals below. The question posed is whether the state courts are incorrect in their interpretation of the *Euclid* caveat or whether the federal court is in error in not applying the broader concept of the general welfare. Only this Court can answer the question by granting certiorari in this case. The divergence between the state courts and the court of appeals in regards to *Euclid* is outlined *infra.*

A. Recent State Court Decisions Have Mandated a Broad Concept of the General Welfare

In recent years state courts have frequently grappled with the *Euclid* caveat in recognition of the fact that many contemporary land use problems, such as maintaining air and water quality and balancing the allocation of land space among competing demands, transcend municipal boundaries.[6]

[6]The evolution of the judicial trend to require a regional perspective in land use planning may be evidenced by a reading of the following cases: *Duffcon Concrete Products, Inc. v. Borough of Cresskill,* 64 A.2d 347 (Pa. 1949); *Borough of Cresskill v. Borough of Dumont,* 104 A.2d 441 (Pa. 1954); *National Land and Investment Co. v. Kohn,* 215 A.2d 597 (Pa. 1966); *Oakwood at Madison v. Township of Madison,* 283 A.2d 353 (N.J. 1971); *Appeal of Girsh,* 263 A.2d 395 (Pa. 1970); *Appeal of Kit-Mar Builders,* 268 A.2d 765 (Pa. 1970), and *Scott v. City of Indian Wells,* 6 Cal. 3d 541 (1972). Although the California Supreme Court in *Scott* did not expressly refer to the *Euclid* caveat, the decision reflects the broader concept of the general welfare. The California Supreme Court considered the actions of the City of Indian Wells in permitting a development near its borders which affected the surrounding noncity residents. The court expanded the protection afforded nonresidents and held that they were entitled to notice and an opportunity to be heard to challenge zoning decisions that affect their interests. By extending standing to nonresidents, the California Supreme Court requires the municipality to give full consideration to nonresident property interests; in effect, imposing a duty to consider regional externalities.

The following articles provide helpful discussion of the issue of whether municipalities must consider regional needs: Com-

In *Roman Catholic Diocese of Newark v. Borough of Ho-Ho-Kus,* 220 A.2d 97 (N.J. 1966), the New Jersey Supreme Court stressed the nonlocal approach to the meaning of "general welfare." In his concurring opinion, Mr. Justice Hall commented, with regard to an ordinance which prohibited schools in a residential area, that an unqualified prohibition cannot be allowed to stand where its purpose is to further some indefensible parochial interest at the expense of interests which transcend municipal boundaries. He stated that:

> "In my view, such action is not legitimately encompassed by the zoning power and the courts have to and should say so. *The substantive question seems to me to fall clearly within the following language from the foundation case of Village of Euclid, Ohio v. Ambler Realty Co.* (citations omitted)." *Roman Catholic Diocese of Newark v. Borough of Ho-Ho-Kus, supra* at 103.

The line of New Jersey and Pennsylvania cases cited herein at footnote 6 has culminated in two important zoning decisions which highlight the degree of importance attached by state courts to this Court's statements in *Euclid.*

In *Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel,* 336 A.2d 713 (N.J. 1975), the New Jersey Supreme Court considered provisions of Mount Laurel's zoning code. The New Jersey court

ment, *Judicial Limitations on Parochialism in Municipal Land Use Decisions: Scott v. City of Indian Wells,* 25 Hastings L.J. 739 (1974); Comment, *Validity of Local Ordinances Depends on Considerations of Regional, Not Merely Local, General Welfare,* 25 Vand. L. Rev. 466 (1972); Walsh, *Are Local Zoning Bodies Required by the Constitution to Consider Regional Needs?,* 3 Conn. L. Rev. 244 (1971).

held that certain code provisions were invalid because they failed to provide for adequate development of low and moderate income housing. The court pointed out that zoning, as an exercise of the police power, must address itself to the general welfare. As to *whose* general welfare must be recognized the court stated:

> "[I]t is fundamental and not to be forgotten that the zoning power is a police power of the state and the local authority is acting only as a delegate of that power and is restricted in the same manner as the state. *So, when regulation does have a substantial external impact, the welfare of the state's citizens beyond the borders of the particular municipality cannot be disregarded and must be recognized and served.*
>
> "This essential was distinctly pointed out in *Euclid* where Mr. Justice Sutherland specifically referred to '. . . the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.'" *Id.* at 726 (emphasis added).

The *Mt. Laurel* decision clearly requires the "nonlocal" approach to the meaning of the "general welfare" in cases involving facilities of broad public benefit, such as housing.

In another case, New York's highest court ruled that towns *must* zone for a balanced and integrated community. In *Berenson v. Town of New Castle,* ..... N.E.2d ..... (No. 430, N.Y. Ct. of App., December 2, 1975), the New York Court of Appeals ruled that the Town of New Castle, whose zoning ordinance excludes multi-family residential housing, must defend

the reasonableness of its entire ordinance in a suit by a landowner desiring to construct an "age-oriented" condominium development, including multi-family housing. The appeals court decision requires the lower court to analyze New Castle's zoning in terms of its impact on *regional* housing needs in determining the reasonableness of the land policy. The court stated:

> "[T]here must be a balancing of the local desire to maintain the status quo within the community and the greater public interest that regional needs be met." (Slip Op. filed Dec. 2, 1975, at 8.)

It is undeniable that *Euclid* has given rise to an adoption of the regional standard for reviewing the validity of local land use decision making in the state courts. Adoption of this regional standard comes as a result of the recognition that the parochial exercise of land use regulatory authority can no longer be tolerated where to do so would force one community to absorb the burdens which another would cast off.[7]

B. The Refusal of the Court of Appeals to Require A Balancing of Local v. Nonlocal Interests Violates The Meaning of Euclid

The trial court found that if the Petaluma Plan proliferated throughout the San Francisco region, the deficit in needed housing would be approximately 105,000 units for the decade 1970-1980. *Construction*

[7]If Petaluma can control population growth, without regard to external or internal factors, other communities will adopt like measures to prevent a disproportionate share of the burdens incident to increasing population from descending upon them. There is currently a propensity to adopt a variety of measures with which to control growth. *See* Clark, *Growth Control in California: Prospects for Local Implementation of Timing and Sequential Control of Residential Development*, 5 Pac. L.J. 570, 594-602 (1974).

Ind. Ass'n. of Sonoma Cty. v. City of Petaluma, 375 F. Supp. at 580. The court of appeals has given Petaluma carte blanche authority to wholly ignore such needs in devising its growth control plan. This is in sharp contrast to the reasoning of the New Jersey Supreme Court in *Mount Laurel* which required a nonlocal approach to the general welfare in cases involving facilities such as housing.

Although the court of appeals conceded that "some persons desirous of living in Petaluma will be excluded under the housing permit limitation and that, thus, the plan may frustrate some *legitimate regional housing needs,*" it refused to address the question of whether promotion of Petaluma's self-interest justified the sacrifice of legitimate regional housing needs. *Construction Ind. Ass'n. of Sonoma Cty. v. City of Petaluma*, 522 F.2d at 905 (1974) (emphasis added). State courts citing *Euclid* have held such inquiry to be mandatory.

The court of appeals reached a contrary conclusion, relying on *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), and *Ybarra v. City of Town of Los Altos Hills*, 503 F.2d 250 (9th Cir. 1974), and held that the "concept of the public welfare is sufficiently broad to uphold Petaluma's desire to preserve its small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace." *Construction Ind. Ass'n. of Sonoma Cty. v. City of Petaluma*, 522 F.2d at 909. *Amicus* Pacific Legal Foundation submits that such holding is erroneous in that it is not the *legitimacy* of the interest that

justifies the means, but whether, in the balance, the promotion of local interests can be allowed to sacrifice the general public interest. *Amicus* submits that *Belle Terre* must be read in conjunction with *Euclid,* which the court of appeals failed to do. Such reading would result in an invalidation of the *means* by which the local interests are sought if the interests of the region were of greater importance and would otherwise be sacrificed.

We submit, contrary to the opinion of the court of appeals, that *Belle Terre* was never intended to allow parochialism or selfish municipal interests to control, where a land use regulation can and does have the far-reaching effects as demonstrated in this case.

Amicus submits further that the state courts are correct in their interpretation of *Euclid. Euclid* does not contemplate that the court should be required to perform the task of a regional planner. Nevertheless, *Euclid* does contemplate that the courts will require that municipalities balance nonlocal with local interests in regards to a specific land use proposal.

CONCLUSION

It is respectfully submitted that a writ of certiorari should be granted herein for the reason that the decision of the court of appeals has an immediate importance far beyond the particular facts and parties involved in this case and is predicated upon prior de-

cisions of this Court whose implications are in need of clarification.

Respectfully submitted,

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